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THE HANDBOOK SERIES

SELECTED ARTICLES ON COMMERCIAL ARBITRATION

COMPILED AND EDITED BY

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WITH A FOREWORD BY

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FOREWORD

The settlement of disputes by arbitration is not new. It has existed from the time men began to trade and to barter. The United States in common with other countries has had men of vision and of experiment who have recognized its value and have established the practice of arbitration in certain communities and in many trades.

The concerted effort, however, to make its practice universal and to make the United States the foremost exponent of arbitration is recent.

The value of good-will as a business getter and a contract keeper has long been recognized. It now has a definite sales value in relation to business enterprises. Commercial good-will is now a form of legal property.

On the other hand ill-will is a liability and a risk.

Arbitration is a prime factor in the smooth running of the commercial machine, thus adding definitely to its value and productivity. Settlements by arbitration are frequently more equitable than decisions of courts of law because the boards are composed of experts. Court delays are avoided. Legal expenses are eliminated. Good-will is builded. A consequent enhancement of values is inevitable.

The presence of arbitration clauses in contracts facilitates the settlement of a dispute at its incipency. In the motion picture industry when arbitration is found necessary more than 50 per cent of the cases are settled amicably before the arbitration takes place.

Mr. Bloomfield's book on commercial arbitration, arranged as a debaters' handbook, and giving both sides of the questions which have been raised by the foregoing activities should prove most useful at this time. The book is especially valuable in that it provides the source of

material and has gathered for the first time a collection of the opinions, addresses, articles and other recorded thought of the leaders in industrial and professional life. It will be useful wherever students, writers and workers debate the merits of arbitration.

WILL H. HAYS

Member Board of Directors,
American Arbitration Association
President

Motion Picture Producers &
Distributors of America, Inc.

EXPLANATORY NOTE

The growing volume and complexity of business, the crowded calendars of our courts and the delays and expense of litigation have resulted in a more practical interest in the latest methods of settling business disputes outside the courts. The modern business executive is eager to find new ways of promoting sound relations between business men and to remove the wastes that **destroy progress.**

Commercial arbitration, or the settlement of business disputes under appropriate statutes, is making a strong appeal to business men. The literature on the subject is new and scattered. Yet there are certain documents, magazine articles, and reports which are of first importance and which, as time goes on, will prove to be more and more valuable. It is the aim of this Handbook to make the best material on Commercial Arbitration available in compact form, edited and organized in such manner as will make it of direct, practical value not only to the business man, but to the lawyer and the student.

This Handbook presents the most complete bibliography on the subject that has yet appeared in print. Readers who wish to examine the entire literature will find here a useful guide. The brief giving the arguments for and against commercial arbitration enables the reader to learn quickly why arbitration is important. The selections in the book are all authoritative. This is the first published collection of basic material on commercial arbitration. It is issued in the hope that it will give added stimulus to the movement for making arbitration **universal.**

In the preparation of this book the editor consulted every available source of information as well as

a number of leaders in the field whose generous assistance is here gratefully acknowledged. Among those who helped are: Mr. Charles L. Bernheimer, chairman of the Committee on Arbitration, Chamber of Commerce of the State of New York; Mr. Julius Henry Cohen, author of the new Federal arbitration law; Mr. Kenneth Dayton whose profound knowledge of commercial arbitration and suggestions have added considerably to the value of this Handbook; Judge Moses H. Grossman; Miss Frances Kellor and Mr. Stuart Lewis of the American Arbitration Association.

I am especially indebted to the American Arbitration Association for the privilege of reprinting its material and for constant cooperation in the preparation of the Handbook.

DANIEL BLOOMFIELD.

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BRIEF

RESOLVED: *That arbitration of commercial disputes under appropriate statutes is an effective substitute for litigation.*

AFFIRMATIVE

INTRODUCTION

- A. Arbitration defined.
- B. Commercial (statutory) arbitration defined.
Agreements to arbitrate under old arbitration laws or common law practice are revocable. The purpose of commercial arbitration laws is to make arbitration agreements and awards valid, enforceable, and irrevocable except on such grounds as exist at law or in equity for the revocation of any contract.
- I. Commercial arbitration under appropriate statutes, administered by responsible trade associations, and chambers of commerce, within their proper field serves the needs of business better than they can be served by litigation.
 - A. The jury system is unsuited to the settlement of controversies arising out of commercial causes.
 - 1. The average jury does not have knowledge of business practices.
 - a. It is uninformed on technical questions involved, usually those of quality and condition of goods, their distribution including shipping, storing, insuring and mode of payment.
 - 2. Appeals to juries are generally made to

- their emotions rather than to their intellects.
3. The system makes for waste of time in hearing complicated issues and adds to costs.
 - a. Juries must be instructed in the subject of dispute.
 - b. They must be guided by the rules of evidence.
 4. It causes congestion of court calendars.
 - a. This encourages the unscrupulous or financially embarrassed to demand jury trial and so gain perhaps a year or several years before trial.
 - (1) This is unfair to the courts and to the aggrieved party.
 - (2) Many claims are abandoned or compromised unfairly to escape the greater penalty of litigation.
 - (3) Business suffers indirectly by tying up assets.
- B. Arbitrators experienced in business are more reliable than courts in interpreting business practices.
1. Commercial arbitration provides arbitrators conversant with particular industries or businesses to decide questions of business usage and good practice.
 2. "The judge, however versed in commercial law cannot be equal to the expert lay arbitrator who has spent a long career in a narrow and technical field."—*Harley*.
- C. Arbitration procedure is more flexible than court procedure.
1. It is simple.
 2. There is little formality.
 3. It does away with jury trials.

4. Hearings are set at the convenience of the parties.
 5. There are rarely more than two hearings required for a case.
 6. Adjournments can be made to meet the convenience of all concerned, but they cannot be arbitrary or unreasonably long.
 7. Witnesses and principals lose a minimum of time.
 8. There may be any number of arbitration hearings going on at one time.
 9. There are no technicalities of procedure.
 - a. Rules of evidence are waived.
 10. It overcomes the difficulties inherent in legal procedure as to jurisdiction over parties and subject matter.
 11. It permits creation of temporary, but legally and narrowly circumscribed tribunals on short notice, in many places, expanding or contracting in number to accord with the volume of business.¹
- D. Arbitration is private.
1. It avoids publicity.
 2. It preserves trade secrets.
 3. There is no public record.
 4. The awards create no precedents.
- E. Arbitration is less expensive than litigation.
1. The fees for arbitrators are in ordinary cases nominal and agreed in advance to be paid by both sides or optionally by the loser, or as the arbitrators may decide.
 - a. In cases needing a large amount of time and labor by the arbitrators and involving large sums, fees can be in-

¹The temporary tribunals referred to are those conducted under the close supervision and guidance of business or trade associations.

creased to cover the actual value of work rendered.

2. Lawyers are not necessary.
 - a. Where lawyers appear their fees are relatively small.
3. It saves court costs which generally fall on the defeated party.
4. It saves the time of the parties and of witnesses by expediting action on issues. Decisions are prompt.
 - a. This relieves the business man of the worry and expense of time to which he is subject and liquidates his claims promptly.

F. Arbitration conserves friendly feeling.

1. It dignifies the parties.
2. It insures justice to both parties on the point at issue instead of on a technical point of law.
 - a. Decisions under arbitration are based on the rights involved and are reached by common sense with the minimum of legal technicality.
 - b. Disputes are settled on their merits. Compromises or splitting of differences are rare.
 - c. It protects the financially weak against the financially strong.
 - d. It releases quickly business funds tied up in protracted litigation.
3. It brings a more cooperative spirit into business life.
4. It raises business standards and maintains business honor.
5. Compulsion is the central feature of judi-

cial procedure while mutuality and voluntary submission underlie arbitration.

- G. Arbitration promotes justice.
 - 1. Hearings are quickly arranged.
 - 2. Witnesses are available when needed.
 - a. The delays in courts often result in the loss of witnesses by death, failure to find them or heavy expense in securing their attendance.
 - 3. Memories of witnesses are fresh.

II. Commercial arbitration supplements the courts. It does not supplant them.

- A. Arbitration statutes are *procedural* law.
- B. The rules of arbitration adopted by the parties are procedural law.
- C. Arbitration is a modern expansion of legal procedure adapted to modern needs and intended to assist and relieve the courts.
 - 1. Analogy is found in the creation of courts of chancery and reference of common law actions to referees, and of chancery suits to masters.
- D. The courts, in our modern arbitration acts, stand in the position of enforcing valid agreements to arbitrate, of vacating awards when fraud is shown or flagrant departures from good practice, and of recording awards as judgments and executing them the same as any other judgments.
- E. Arbitration is not something alien to judicial procedure. It is a method of adjudication recognized not merely by statute law, but by the courts, since its awards may become judgments of the courts and may command all the processes of the law in their execution that any other judgments command.

1. It would be extremely difficult to operate stock and produce exchanges, where contracts are made by the thousands daily, if every misunderstanding had to be solved in courts under our accustomed procedure, in which jury trial plays so large a part.
- F. Courts and the legal profession have much to gain and nothing to lose by the spread of arbitration.
 1. "The small number of arbitrations relatively to the vast number of arbitration clauses points to the fact that the existence of the clauses in general use is a great deterrent to avoidable disputation."
—*E. Raymond Street, Secy. Manchester (Eng.) Chamber of Commerce. Manchester Guardian. 1923.*

III. Commercial arbitration strengthens the trade organizations, and chambers of commerce which encourage it.

- A. It is constructive.
- B. It makes for greater cooperation among members.
- C. It makes membership more desirable.
- D. It saves time, trouble, money and feelings.
- E. It makes for appreciation of organized control and regulation.
- F. It enables parties to select arbitrators to act as their judges from those who stand highest in their branch of trade because of experience, personal qualifications and proved integrity.
- G. In chambers of commerce whose membership varies, comprising no one specific trade activity the arbitrators selected by the parties do

not fall within the trade bias that members of trade associations may be subjected to.

Example: *Coco beans*

If arbitrated by a chamber of commerce instead of the Coco Merchants Association the arbitrators would be:

A Coco Importer

A Coco Broker

A Chocolate Manufacturer or

In case of Burlap, the arbitrators would be:

A Burlap Importer (or shipping Merchant)

A Burlap Jobber

A Rug Manufacturer.

IV. Commercial arbitration is endorsed by a large number of important interests.

A. A very large number of important commercial organizations throughout the country.

B. The President of the United States.

C. Secretary Herbert Hoover.

D. The legislatures of New York, New Jersey, Massachusetts, Oregon and other states.

E. The Chamber of Commerce of the United States.

F. The International Chamber of Commerce which represents the leading business organizations of the world.

V. Commercial arbitration may develop a strong sentiment in favor of a higher form of arbitration, the arbitration of disputes between nations and as a result of that, the development of a higher form of patriotism.

NEGATIVE

INTRODUCTION

- A. Ordinary (common law) arbitration and commercial (statutory) arbitration compared.
 - B. The support of commercial arbitration is chiefly the propaganda of a few business men and lawyers.
 - C. Commercial arbitration is undesirable.
- I. The use of arbitration procedure in business disputes is rare and often unsatisfactory.
 - A. It gives no real and permanent relief.
 - B. The common practice of requiring each party to select an arbitrator and these two arbitrators to select a third means that arbitrators are champions and partisan rather than neutral.
 - II. Arbitration by trade associations is undesirable.
 - A. The arbitrators are all made up of two general classes, merchants or dealers, and brokers.
 - 1. Their natural tendency in any dispute will be to side with their own class.
 - B. In many trades a few firms dominate the entire trade which may include a number of smaller firms.
 - 1. In any arbitration to which one of the big firms is a party, it may find feeling against it among the smaller firms so hostile that a fair hearing is not possible.
 - 2. The smaller members of the trade who are apt to be sitting in judgment on the dispute are affected by fear of the big competitor or their desire to get business with him and so cannot exercise their arbitral power impartially.
 - C. If the facts in dispute are material and must be proved by evidence of witnesses, their ex-

amination and cross-examination are apt to take more time before an arbitrator than before a judge.

III. Law courts are the best tribunals for enforcement of rights.

A. Business men have greater faith in judges than in others.

1. Judges have long training and experience in settling disputes.
2. They invite confidence and respect.
3. They are independent of the parties who come before them.
4. They can view with better balanced judgment the issues they have to try.
5. They have the faculty of grasping facts rapidly, of appreciating their relative significance and of drawing correct inferences from them with logical precision.
6. They have coercive control over the persons appearing before them whereas arbitrators have not such control.

B. When the stakes are high, business men prefer to have a court handle the case.

1. There is greater efficiency in handling the case than under arbitration.
2. Adequate settlement is insured.

C. Arbitrators are not impartial and judicial.

1. They generally try to effect a settlement by merely "splitting the difference." They are "compromisers."
2. They consider themselves advocates of their respective sides.
 - a. It is the third arbitrator who really decides the dispute.
3. They do not discriminate in the kind of evidence they will hear, and the time spent

is often greater than that a court would allow.

4. Where arbitrations are conducted by inexperienced arbitrators, they are frequently disastrous.
- D. "One important disadvantage of commercial arbitrations is that they are not reported and one decision is no precedent for another. Commercial arbitrators are perfectly distinct in the various cases and however bona fide they may be, they are not bound by the decisions of themselves or of other arbitrators, so that one of the most useful functions of courts, viz., to establish a precedent for future use, is quite lost."—152 *Law Times* 244.
- E. Commercial arbitration is not necessarily expensive.
 1. Arbitration is often found to be more lengthy and expensive than a hearing of the case in court.
- F. Court action means a *public* record.
- IV. Commercial arbitration lies outside the scope of judicial administration.
 - A. It ousts the court of its jurisdiction.
 1. It permits persons to contract away their right to go into court.
 - B. It is alien and hostile to the courts.
 1. It competes with the courts.
 - C. Legal questions are left for solution to lay arbitrators.
 1. They may disregard settled principles of law.
- V. There is no need of this form of arbitration.
 - A. Business has always gotten along without commercial arbitration.

- B. When commercial arbitration is practised, few cases are submitted to arbitration.
 - 1. The majority of business men have no interest in commercial arbitration.

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SOME DEFINITIONS OF ARBITRATION

The hearing and determination of a cause between parties in controversy by a person or persons chosen by the parties, or appointed under statutory authority, instead of by the judicial tribunal provided by law.—*Webster. New International Dictionary.*

Arbitration is a substitution, by consent of parties, of another tribunal for those provided by the ordinary processes of law.—*Boyden vs. Lamb* 152 *Massachusetts* 419.

Arbitration is a hearing and determination of a cause between parties in controversy by a tribunal selected by them.—*Duren vs. Getchell* 55 *Missouri* 241, 247.

An arbitration is a domestic tribunal created by the will and consent of parties litigant, and resorted to to avoid the expense of delay, and ill feeling consequent upon litigating in courts of justice.—*Reilly vs. Russell* 34 *Missouri* 524, 528.

In its broad sense it is a substitution by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal, as contradistinguished from a regularly organized court proceeding according to the course of the common law, depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is the final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties.—5 *Corpus Juris* 16.

WHAT IS COMMERCIAL ARBITRATION

Arbitration is a method of settling differences between business men without ordinary litigation. Decisions are

obtained by the submission of facts to one or more arbitrators, whose award is binding and legally enforceable. When disputants sign an agreement to arbitrate, this agreement, *under approved arbitration laws*, is irrevocable; neither side can withdraw, and both must abide by the decision.—*Massachusetts Council for Commercial Arbitration*.

THREE KINDS OF ARBITRATION¹

There are three kinds of arbitration recognized by the law. Briefly stated, they are:

1. Where the matter in dispute is submitted by the parties to mutually chosen arbitrators, in the absence of, or in spite of, statutory provisions.

2. Where a specific statute gives the parties to a dispute authority to submit the same to arbitrators and have the submission entered as a rule of court and the award enforced, or entered as a judgment of a designated court.

3. Where a court sends a matter pending before it to arbitrators, with the consent of the parties, the arbitrators either being chosen by the court or by the parties.

"SUBMISSION" OF BOTH PARTIES NECESSARY

There can be no arbitration of a dispute unless there is a submission of the matter to arbitration. This expression "submission" is a legal phrase involving certain requirements which must be met in order to give the arbitration full legal effect.

"A submission," says one authority, "is a *contract* between two or more parties, whereby they agree to refer the subject in dispute to others, and to be bound by the award of the latter."

The essential thing to keep in mind is that a submission of a matter in dispute to arbitrators is a contract and that it must have all the essential elements of a valid contract, in order to be binding upon the parties.

¹ From "When You Arbitrate," by C. C. Sherlock. *American Machinist*. 54:130-2. January 17, 1924.

This involves, first of all, the implication that the parties have the legal capacity to contract between themselves and that if they do it by representatives, that these representatives shall have the power to bind their principals by their agreement. Otherwise the award made by the arbitrators can have no effect as to binding the parties and they may disregard the findings, if they so desire.

The important essential, according to a Missouri case, is that the minds of the parties must meet in an agreement to do a specific thing. If this is not present, there is no submission, and the arbitration fails to have any legal effect.

GROWTH OF COMMERCIAL ARBITRATION

REDUCING FRICTION IN BUSINESS¹

The world is dissatisfied with wasteful methods of settling disputes. There is much dissatisfaction, and just dissatisfaction, with the administration of justice in the courts. When all has been said and done, the litigant never gets complete justice. He must pay his lawyer's bill; he must attend in court with his witnesses; and the decision in the litigation, even when he is successful, rarely succeeds in setting him right or in making him whole. This is especially true of the class of litigation known as "commercial law-suits." Much of this litigation turns upon honest differences of opinion, or honest differences of recollection, or misunderstandings as to facts.

In the whole world of business the tendency is towards economy. How can I save in the cost of production? How can I save in the cost of distribution? How can I systematize methods? These are the things the business man asks himself when he is either manufacturing, jobbing, or selling. In short, the effort is towards economy of energy, and thus a reduction in cost. In doing this the business man is rendering a service to the whole country as well as to his own business.

For a long time the business men of the country have failed to turn their attention to the administration of their own business in the law courts. They have failed to apply the same methods and principles of economy in the handling of their litigation that they apply in the handling of their own businesses. They have, how-

¹ From *Outlook*. 100: 258. February 3, 1912.

ever, at last awakened to a realization that the disposition of mercantile disputes is just as much a part of the business of the large-minded business man as is the matter of advertising, production, or distribution.

LORD COKE'S DICTUM IN VYNIOR'S CASE²

For over 300 years the business world has been more or less constricted by a rule of law following the dictum pronounced in 1609 by Lord Edward Coke in Vynior's case. Lord Coke in his day had said "that though one may be bound to stand to the arbitrament yet he may countermand the arbitrator . . . as a man cannot by his own act make such an authority power or warrant not countermandable which by law and its own proper nature is countermandable." In the days when Lord Coke spoke, an arbitrator was regarded not as a person to judge of the merits of the controversy, but as an agent selected to confer with another agent with a view of compromise, and as an agent's power was always revocable by his principal, it was natural for Lord Coke to say the power of the arbitrator as an agent was revocable. This should be a warning to the modern arbitrator. If he is merely an agent to compromise, his power should be revocable; if he is selected as a Judge his powers should be irrevocable; but for three centuries what business regarded as a common sense method for the settlement of every day trade disputes was subject to the uncertainty of revocation by the least reliable of the parties to the agreement. This three-century old dictum restrained the development of business. A contract, sacred and enforceable in all other respects was invalid and unenforceable as to that portion of it which would have eliminated possible friction between the parties. The

² From *Annual Report Chamber of Commerce of State of New York*. May 7, 1925. p. 5. Committee on Arbitration. For complete discussion of Lord Coke's rule and its effect on the courts see *Commercial Arbitration and the Law*. Julius Henry Cohen. Appleton & Co. New York. 1918.

theory that it was contrary to public policy to allow the parties to a dispute to arbitrate was hardly tenable in view of the fact that the law encouraged parties to compromise and encourage arbitration. The theory that the courts were by such arbitration ousted of jurisdiction was unsound because the courts permitted themselves to enforce arbitration awards if the arbitrators had gone so far as to make an award.

The notion that as to this portion of the contract a party could relieve himself whenever it suited his own interest and convenience was, of course, morally unsound and placed business men in a false position. This doctrine was what the lawyers called an anachronism in the law. Many of the leaders of the bar joined with business men in calling for the elimination of this anachronism. The first State to respond was New York, the second was New Jersey, and now the Congress of the United States has spoken. Massachusetts and Oregon then followed.

Centuries ago arbitration had legal standing; but early English judges, acting on the principle that a good judge should extend his jurisdiction, snubbed that method of solving disputes. In 1609 Coke ruled against the legality of contracts to arbitrate *in futuro*, basing his opinion upon the common law. This rule crossed the ocean, and until the passage of the New York arbitration statute in 1920 dominated American legislative and judicial decisions in this important matter. No fruitful union of legal formality and business practice in this connection could be brought about here until it was shown that Coke was wrong. Coke was finally unhorsed by Julius Henry Cohen, counsel for the committee on arbitration of the New York Chamber of Commerce whose researches in black-letter texts of Norman-French decisions proved that Coke did not know his common law as well as modern lawyers.—*Independent*. 115:725. December 26, 1925.

COMMERCIAL ARBITRATION IN ENGLAND^{*}

A very large proportion of the business disputes of England never come into the courts at all, but are adjusted by tribunals established within the various trade associations and exchanges. This is especially true of the vast distributing trades which are responsible for a great part of the immense volume of imports and exports constantly flowing through the ports of England and giving them the commanding position they occupy towards the sea-borne trade of the world. Disputes over the quality and condition of consignments of grain, cotton, sugar, coffee, fruit, rubber, timber, meats, hides, seeds, fibres, fats, and countless other articles of commerce, as well as every conceivable variety of dispute that can arise out of a contract for sale and delivery such as questions of delays, quantities, freights, interpretation, etc.—all these are passed upon by business arbitrators selected by reason of their familiarity with the customs of the trade and with the technical facts involved, and not submitted to juries whose ignorance would usually be equally comprehensive.

So firmly established is the custom of arbitration in these lines that every contract-form used by shippers, brokers, buyers and users of these articles contains a clause binding the parties to submit to arbitration any dispute that might arise out of the contract. But it is not these trades alone that resort to arbitration. The arbitration clause will be found in every charter-party for the hire of a ship, in every bill of lading for goods carried by sea, in every salvage agreement, in every policy of marine, accident or fire insurance, in every building contract, in every engineering contract whether mechanical, electrical or gas, in every lease of property, in every partnership or agency agreement, and in innumerable other forms of contract. Finally, there is a well confirmed

^{*} From *Report on Commercial Arbitration* by Samuel Rosenbaum, Esq. American Judicature Society. October, 1916. p. 7-9, 18-19.

tradition among business men, even though there is no written contract covering a particular dispute, to submit differences to arbitration after they have arisen.

By the Law of England an agreement to arbitrate is enforceable, for the courts will refuse to entertain a suit brought by a party to such an agreement, and the pleading of the agreement will defeat any action brought on the contract. The parties are bound to arbitrate. Further pressure is brought to bear on persons unwilling to arbitrate, by the trade associations, which will suspend their privileges from members who do not submit to the rules for arbitration.

In some associations there is an Arbitration Committee before whom the hearings are held in the first instance; others require the parties to name their own arbitrators (either one or two or three), but provide a Committee of Appeal of the association which will hear appeals from the awards of arbitrators; some publish lists of arbitrators, naming their fields of special knowledge, for the guidance of intending parties to arbitrators. In many cases lawyers are selected to sit as arbitrators, either alone or together with business men.

A very strong feature is that in any case the arbitrators may obtain the opinion of a court of law any legal question arising in the course of the proceedings which they feel must be decided before they can properly dispose of the case completely. The arbitrators will submit to the court a statement of so much of the facts necessary to raise the point in question; the point will be decided by the court, and the arbitrators are then bound to use that decision in coming to their final conclusion. Again, the arbitrators may be able to agree on all the actual facts in the case and determine them completely; they may then state their award in the form of a complete statement of the facts, asking the court to apply the law thereto just as it would on a verdict found by a jury.

When this method is pursued arbitration affords the ideal form of procedure. A judge is handicapped in hearing a trade dispute by his lack of technical information; a commercial arbitrator, though he has not the same capacity for weighing and sifting evidence as a trained judge, knows instinctively what the usages and course of his particular business require. On the other hand the layman should not attempt to decide questions which are purely on the law: after finding the actual facts as they are, he should turn them over to the court for the application of the law.

The advantages of arbitration over litigation are therefore mainly to be found in the intelligent decision of questions of fact. In addition to this one must consider (1) that arbitration is more convenient, because the hearings can be fixed to suit the convenience of business men so that they need not waste time waiting in court-rooms; (2) it is more expeditious as a case can be finished in a few days if necessary; (3) it avoids irritation, as there is no publicity, and no such staging of a trial as in an open court where the parties face each other like enemies. But it must not be supposed that arbitration is necessarily cheaper than law-suits; in the average case it will not be cheaper in actual expenditure, although the saving of time and friendship and the satisfaction of an expert decision are worth much.

* * *

At common law an agreement to arbitrate, or a submission as it is called, was no different in legal effect than any other agreement. A party to it could at any time revoke the arbitrator's authority, in which case the arbitration was abortive; or a party could, in spite of his agreement to arbitrate, begin a lawsuit upon the same subject-matter and so render the submission useless. In either case the only remedy for the party aggrieved was an action for damages caused by the breach of agreement. The Courts would not enforce the agreement it-

self, because of a theory that it was in derogation of the powers of the courts and therefore unholy. In the early days judges, as well as other court officers, were paid by fees on the volume of business that came to them and being only human they looked with disfavor upon any limitations on their powers. It is easy to appreciate the psychology of the legal maxim: "The office of a good judge is to extend his jurisdiction," and speaking of the suspicion with which courts of law regarded arbitrations, Lord Campbell observed: "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive any one of them of jurisdiction." Judges no longer have the same interest to serve, but like some other doctrines in the law, this one survived the conditions out of which it arose, and we hear it solemnly proclaimed in American Courts today that any agreement to "oust the jurisdiction of the courts" such as a submission to arbitration is "against public policy."

In England the inherited antipathy of courts to arbitration has been cured by a course of legislation which, though extending over a period of nearly two centuries, is now gathered and codified in the Arbitration Act, 1889. The two outstanding features of that law are that a submission to arbitration cannot be revoked, and that an award of the arbitrators may be enforced like a judgment of the courts.

Arbitration is an ancient element in our law. It was, in a measure, encouraged at an early stage of the common law. But it existed also in another realm of law which for several centuries was just as real as the common law. For, from time immemorial, merchants set up their own tribunals and administered justice in their own way to their entire satisfaction. We have no large body of literature illustrative of this fact, but we know that the

business litigation which in our day bulks so large was virtually unknown for several centuries to the common law courts. These courts grew out of different needs and their procedure was not adapted to the requirements of commerce.

When in the eighteenth century the law merchant was recognized in English courts, commerce had reached a stage where operations were much larger, where buyer and seller no longer met face to face, where something different was needed. Then began the effort of the law courts to serve the needs of commerce, an effort which probably contributed more than any other to the dissatisfaction with judicial procedure which flourished for about one hundred years and finally resulted in sweeping reforms in English court organization and procedure.

England unified all her courts by the acts of 1873 and 1875 and at the same time restored to the judges their power to control procedure through rules of court and provided them with administrative self-government. The reformation was completed.

But by 1875 commercial arbitration had attained a strong position in England. Parliament recognized its need for legal control in a comprehensive act passed in 1889. The High Court of Justice endeavored to meet the need for speedy and expert adjudication by setting up in London a special commercial branch which was not only relieved of the jury but even dispensed with written pleadings. This court has served as useful purpose, but has had no observable effect in diminishing the progress of commercial arbitration, which continued to expand until it took care of nearly all the business litigation of the country except the smaller causes triable expeditiously in the County Courts. The Commercial Court in London still offers procedure ideally simple and prompt, but it is said to try only about three or four hundred cases per year. If the experiment had destroyed arbitration by competition there would have to be probably fifty such

commercial branches in London instead of but one.—*American Judicature Society. Journal.* 9:69-70. October, 1925.

REASONS FOR GROWTH OF ARBITRATION⁴

Some of the reasons for the present more extensive use of arbitration are obvious. The congestion of the courts, the delays incident to trials, the inconvenience in meeting court engagements, the expense, are all contributing causes. The chief argument for arbitration, however, is found in the fact that many disputes relate to matters involving quality of goods, trade customs and practices, etc., with respect to which there is, with considerable justice, a feeling that a proper determination of the questions at issue calls for a technical knowledge which obviously cannot be possessed by the ordinary jury, or, except by accident, by the court. In another class of cases, such as the settlement of partnership difficulties, the parties may also desire to avoid the publicity incident to court proceedings.

In our opinion, the strongest argument in favor of arbitration as an alternative to litigation lies in this fact, that arbitrators, especially versed in the matters upon which they are to pass, can more expeditiously, economically and accurately determine the merits of many disputes. It seems clear that the argument will be strongest when the questions at issue are principally questions of fact.

The plea for arbitration amounts substantially to this—that when men have the choice of submitting their disputes either to arbitration or to a court of law, they should elect the former. The plea is sometimes limited to particular classes of cases, but frequently is given practically no limit. Such a plea necessarily carries the im-

⁴From report of special committee, Association of the Bar of City of New York, May 12, 1925.

plication of serious defects in our judicial system at least in so far as the settlement of commercial disputes is concerned. The criticism is one which we believe should not be ignored by the Bench or Bar. It does not appear to come within the scope of this Committee's work to investigate the extent of, the causes for and the remedies appropriate to this condition, but we venture to suggest that the Association give further serious consideration to the matter through some appropriate committee.

Some of the advocates of arbitration have, however, gone almost to the extent of asserting that our system of law and of judicial procedure denies rather than seeks to enforce substantial justice. Undue emphasis has been laid upon the technicalities of law and of the rules of evidence and the notion has been encouraged that litigation was merely a game and that justice was to be had through the ordinary machinery of the courts only by accident. Admitting that perfect justice is an ideal which it is extremely difficult to attain, we believe that talk of the kind just referred to is ill-considered and unsound, that it arises largely from a disregard of obvious facts affecting the field of human relations and that it is positively harmful to the community.

ARBITRATION IN THE UNITED STATES⁶

THE ORGANIZATION OF MARKETS IN THE UNITED STATES

Arbitration in the United States is characteristically a business man's institution devised to facilitate trade. As trade developed in commodities which move in large volume, business men themselves set about creating means for simplifying and expediting their transactions. In doing this they consciously or unconsciously utilized the experience of other countries in organizing markets, so

⁶ By Julius H. Barnes. *International Chamber of Commerce. Digest.* No. 44. April, 1923.

far as this experience was adaptable to American conditions. They have established grades, established facilities for inspection and certification, provided opportunity for buyers and sellers to meet and to conduct their transactions according to the terms of contracts which are thoroughly understood, and organized widespread means for gathering information as to supplies, demand, and prices. This whole effort toward the creation of organized markets of the broadest scope has been to make it possible for each transaction, no matter what its size, to be made with the utmost expedition and with such definiteness that there is no room for a difference between buyer and seller as to the subject matter, the terms or the conditions.

The national policy in the United States adverse to restraints on trade, including restraints which would be wholly lawful in countries with a different economic situation, is well known, but collective action by business men in the ways I have outlined has been sanctioned by our highest tribunal as calculated not to restrain but to expedite trade. However much there may be apparent conflict in other fields between business activity and legal theory, there has in this field been general concurrence. It is true that of late years there have been several instances of legislative regulation of matters incidental to some of the great organized markets, but this degree of regulation has not changed their essential characteristics as institutions created by business men.

ARBITRATION IN MARKETS

Although the effort has been to make each transaction so specific in all of its phases that no misunderstanding can arise, all endeavors will fall short of perfection, and provisions for arbitration of controversies have their place in every organized market. These provisions are an integral portion of the market facilities. They have the same purpose,—the expedition of transactions by speedy removal of difficulties through their immediate

decision according to business rules and business customs as they are understood in the market. That understanding is determined either by arbitrators chosen by the parties, with an umpire, or by a standing committee selected on account of the standing and experience of its members.

DISCIPLINARY MEASURES

Exactly as there is no tribunal separate from the market to which it is intended controversies should be removed, so there is no contemplation of resort to outside means for enforcing awards. One of the obligations of each participant in a market is that he will both submit his questions arising in the market to arbitration and will act in accordance with the award. Failure to abide by an award is consequently rare. If it does occur, or if there is refusal to fulfil the obligation to submit to arbitration, it means ejection from the market,—i. e., expulsion from the organization which conducts the market. Questions as to arbitration in connection with the country's great markets, therefore, ordinarily get into the courts only when a member who has been expelled seeks to have the courts order his reinstatement. Such attempts are unsuccessful.

The principles respecting arbitration in connection with transactions between members of the country's markets organized to facilitate dealing in commodities moving in great volume have been outlined. In matters of detail there is some diversity but this is immaterial in view of the uniformity as to essentials.

LEGISLATION AND ARBITRATION IN MARKETS

These essentials have often been recognized in the legislative enactments which have made corporations of the organizations of business men conducting the markets. Such enactments have frequently conferred upon the arbitration committees of such organizations authority to

issue subpoenas to compel the attendance of witnesses, to administer oaths, and in other ways use means ordinarily incidental to legal procedure in order to develop the facts pertinent to controversies between members submitted to arbitration. Under enactments of this kind in some states, an award with which a member fails to comply may not only be a cause for disciplinary action on the part of the market organization but it may be filed in court as a judgment and thus become a basis for immediate issue of legal process to enforce its execution.

Such provisions for arbitration, and these provisions are effective and in active operation, exist with respect to a large part of the country's commerce. The precise size of this part is difficult to state, but it can be indicated by the results of a recent analysis of our export trade. This analysis demonstrated that almost two-thirds of the export trade of the United States, expressed in values, are composed of articles which are bought and sold upon definite grades established by business men's organizations. As arrangements for arbitration have been provided for transactions in almost all commodities for which grades have been established, it is obvious that well over half of the value of our exports is in commodities which in the United States are bought and sold subject to arbitration, and at least the same percentage would apply to our domestic trade. If the figures were in terms of volume they would be much larger.

The development of an organized market, or its equivalent, has come whenever the volume of trade in a commodity with uniform characteristics, regardless of the individual producers, has gained large proportions. Agricultural products first assumed importance in this way, and our cotton exchanges, our seventeen or more organized grain markets, and the even more numerous markets for other agricultural products have come into existence. When the products of cotton seed took on economic importance on a large scale, grades and arbi-

tration proceedings were provided as to them. Especially with development of the possibilities of our western coast, dried fruit took on importance; grading and arbitration procedure followed. When importation of raw silk began to bulk large there were the same results.

These are merely examples. They will serve to illustrate the situation in the United States where business men have invariably set up means for arbitration when commerce in an article has warranted the creation of specialized markets. Their principle has been that compliance with the purpose for which the market exists requires that members submit their controversies to a business judgment and abide by it. This principle applies, not only as to organized markets for commodities, but also to other forms of organized markets, such as stock exchanges.

ARBITRATION IN RELATED INDUSTRIES

The use of arbitration by no means ceases when one goes beyond the great markets. Problems of a similar kind arise between different groups of manufacturers who deal with one another. When frequent misunderstandings developed between textile manufacturers and garment makers, the organizations representing these two branches of industry set up a joint body charged with the arbitration of these difficulties. Tanners and shoe manufacturers have entered into a similar joint arrangement. In some instances, the producers of an article for further use in manufactures, the manufacturers, and the distributors have undertaken to provide means for arbitration of all questions arising between the time the material is ready for sale to the manufacturer and the finished article is sold by the retailer.

Such arbitration as has been described above obviously relates to transactions literally or substantially between members of the same branch of trade. In effect they are

members of the same market, and members who are using it repeatedly. With them the business judgment of the market is potent, and the moral sanction which exists for the obligation to arbitrate and the obligation to abide by awards is strong.

ARBITRATION OUTSIDE OF MARKETS

There are other important fields of commerce however, and these fields sometimes are not readily susceptible to direct moral sanctions. There are, of course, the transactions between members of organized markets and non-members; frequently, the arbitration procedure of the market is made available to the non-member. Such transactions are not typical of these other fields. Transactions in highly fabricated merchandise which has individuality given by the producer and transactions in merchandise which is individual or specialized in other ways are the types. In connection with such transactions the old principle of *caveat emptor* survives longest.

ARBITRATION BY TRADE ASSOCIATIONS AND CHAMBERS OF COMMERCE

Arbitration in these fields has not been neglected. Where trade associations have perceived a common interest among their members they have taken steps to promote arbitration. Even more largely, however, the commercial organizations of important communities, representing all branches of business interest, have placed arbitration facilities at the disposal of all of their members for their business questions and often at the disposal of all persons in the business community, regardless of membership.

This is not a new activity. The New York Chamber of Commerce has continuously provided for arbitration over a period exceeding a hundred years. At the same time, conditions may cause it to take a new form. The

Chicago Association of Commerce has recently organized an arbitration court, with a panel of arbitrators chosen to represent each of the principal fields of business enterprise in the city, always open and in the charge of an executive who devotes his entire time to the court and who, if the parties to a controversy desire, will act as sole arbitrator. Although it is a general principle of law throughout all of the states that the courts will favor the use of arbitration for settlement of business disputes between business men, some of the courts in Chicago have been noteworthy because of the extent in which they have gone in suggesting that litigants should suspend legal action and resort to arbitration. Like facilities in other large centers the business relations of which are extensive, the arbitration court at Chicago is available for any business house, in another state or in another country, who has a business dispute with a Chicago concern, and under the same conditions as those which apply when both parties to a dispute are Chicago houses.

Arbitration within organized markets and trades may for convenience be termed *trade arbitration*, whereas arbitration which occurs between parties regardless of their membership in any trade may be called *general arbitration*. The outlines which have been given above will suggest that there are facilities for arbitration in all parts of the country. This is the fact. Besides, there are facilities for arbitration in circumstances to which neither existing arrangements for *trade arbitration* nor the provisions of local organizations for *general arbitration* may apply. For any cases of this kind the Chamber of Commerce of the United States offers its facilities. Like the offer of arbitration facilities made by other organizations in the United States, this offer is available for business houses of other countries who will place themselves upon an equality of obligation with the other party to a dispute.

The United States Chamber has gone farther in connection with trade between some Latin-American coun-

tries and the United States. With important commercial organizations in seven countries of South America it has entered into agreements to promote arbitration for solution of disputes in the trade between these several countries and the United States and has set up facilities for arbitration, these facilities being carefully worked out to afford at each step representation of the point of view of nationals of each of the two countries. In other words, the principle of bi-national supervision has been introduced. For inter-country trade there are also the arbitration committees of American chambers of commerce abroad. Since reference has been made to Latin-America, it may be remarked that five American chambers in Latin-America have arbitration arrangements ready for operation whenever occasion arises, and some of them are very active in handling cases.

LEGAL SANCTION FOR ARBITRATION CLAUSES

It will be observed that there is no lack of legislation. Nevertheless, in the field of *general arbitration* situations have arisen which have suggested further legislation. Existing statutes generally relate to submission of controversies after they have arisen. When an original contract has provided that any controversies arising under it in the future will be settled through arbitration, and upon the occurrence of a difficulty one of the parties has refused to arbitrate, the courts have allowed him to persist in his refusal and thus throw the case into the courts. To meet such situations the State of New York has adopted legislation which makes such a general agreement to arbitrate enforceable by the courts and prevents either party, once a question has been submitted to arbitration, from revoking his submission. It has always been law in the United States that, when an award is rendered, neither party can undertake to withdraw.

AMERICAN CONCEPTION OF ARBITRATION

This statement about arbitration in the United States could be much extended. Perhaps enough has been set out, however, to suggest the recognition of long-standing Americans have given to the subject, through the testimonial of use upon a large scale, and the active interest which is now displayed. In the American conception arbitration is not a substitute for proceedings in the courts. It is the rational method for settling business disputes which should not go to the courts. Throughout centuries there has been a rule of government that litigation in the courts should be discouraged. Arbitration as developed and practised in the United States is consonant with that rule. It is not strange, therefore, that business organizations, lawyers and courts work in the same direction,—for the promotion of commercial arbitration.

FORTY STATES HAVE OLD COMMON LAW
ARBITRATION*

In probably forty of our states, the Common Law Arbitration principle is still an integral part of their laws. Under it the arbitrator is considered an advocate or agent of the party selecting him, whom he can at pleasure divest of his agency. This has led to the theory that an agreement to arbitrate can be voided with impunity, thus retarding progress even to the extent of discrediting this beneficial method for the speedy and fair disposition of disputes. This ancient common law principle is discarded in the modern statutory arbitrations permissible under, the laws of the United States and of the States of New York, New Jersey, Massachusetts, Oregon and Illinois. In a few other states, bar and business are now wrestling in cordial collaboration with the subject in their legisla-

* From *Annual Report*, Committee on Arbitration. Chamber of Commerce of State of New York, May 6, 1926. p. 5.

tures. These so-called advocates or agents in arbitration, who, it is alleged, could never quite free themselves from allegiance to those who had appointed them, have by force of law been raised to the position of quasi-judges for the specific dispute before them in the jurisdictions enumerated—they have become “no man’s man” lest they destroy by their own hands and acts the task they have undertaken to perform under oath “to fairly and faithfully hear and decide upon the evidence.”

A BRIEF HISTORY OF COMMERCIAL ARBITRATION IN NEW YORK¹

For over one hundred and fifty years the Chamber of Commerce of the State of New York, more popularly known as the New York Chamber of Commerce, has provided facilities for Commercial Arbitration in the City of New York.

At the earliest meetings of the Chamber in 1768, prior to the Revolution, one of the functions, outlined as a most important part of the Chamber’s activities, was the appointment of a committee on arbitration to settle disputes between merchants. The Chamber has had some method for dealing with commercial disputes from that date right down to the present time.

RECOGNITION BY STATE

Because of the early date of the establishment of the Chamber, and because of the high standing it has held in the life of the community during all these years, the State of New York, recognizing that standing, has passed certain laws directly concerning the Chamber in its work for commercial arbitration. In 1874 a law was passed creating a Court of Arbitration in connection with the Chamber. Under the law, the Governor appointed the

¹ By Chamber of Commerce of the State of New York.

arbitrator. He also appointed as clerk of the Court whoever had been elected to that office by the Chamber. The Chamber was to furnish necessary facilities such as rooms, stationery, clerical assistance, etc., etc. Provision was made that the arbitrator should receive a salary of \$10,000 annually, and that the clerk should also receive compensation. Subsequently another law was passed repealing the provision for payment on the part of the State to the arbitrator and clerk, but placing the responsibility for the remuneration of these officers upon the Chamber.

Under this system, the Court functioned for a number of years with the late Judge Enoch L. Fancher as arbitrator. The Secretary of the Chamber was clerk of the Court. While Judge Fancher was arbitrator, he dealt with cases submitted to him largely as is done by a judge or referee—that is, the briefs were submitted to him and he rendered his decisions accordingly. It was felt by many that this system could be improved, and, upon Judge Fancher's death, the office of arbitrator was not filled for a number of years, and no definite steps were taken toward another system of arbitration until the year 1911.

PRESENT SYSTEM

The matter was again taken up at that time and a standing committee of the Chamber formed to deal with the question of arbitration. This Committee, after making a careful study of all the steps that had been taken, devised a plan which has since been operating in a very satisfactory manner. The procedure of the system as devised by this Committee is carried on under the provisions of the law of the State for arbitration of commercial disputes.

Only matters having to do with commercial disputes are handled. There are three methods which may be adopted by those seeking arbitration.

First: Each party to the dispute may select whom-

ever he may desire as an arbitrator. These two arbitrators then select a third from the "List of Official Arbitrators," maintained by the Chamber's Committee.

Second: Both parties agreeing to the arbitration may submit their difference to one arbitrator selected from the list above referred to.

Third: The question in dispute may be referred to the Chamber's Committee as a whole. This method is intended for exceptional cases only, and thus far it has been found necessary to use it but seldom.

The official list of arbitrators consists of several hundred members of the Chamber, in various lines of business, who have volunteered to serve as arbitrators when called upon. This list is classified as to trades and business, the belief being that the disputes should be tried by men familiar and thoroughly acquainted with all the customs and trade usages of that particular branch of business.

It is, of course, necessary that both parties agree voluntarily to arbitration. Having once done so, and the formal arbitration having commenced, the parties thereto cannot withdraw. When the decision or award has been handed down by the arbitrator or arbitrators, it can, under law, be entered in any Supreme Court in the State and then has legal effect precisely as would be the case in a judgment secured in such court.

ARBITRATION CLAUSES IRREVOCABLE

As time went on, the Chamber's Committee found that there were certain injustices involved in the practice of arbitration in this country as compared with that of other countries—notably Great Britain. In the latter country the Courts had decided, many years ago, that, in a contract, an agreement or clause to submit any differences to arbitration was irrevocable. In this country the Courts held that even though such a clause in the contract had been agreed to, either party to the dispute might

refuse to arbitrate if he so elected, the theory being that under the law every man is entitled to his "day in court." Believing that this did not work creditably to the merchants of this country, on the ground that if a man is competent to enter into a contract whereby he agrees to fulfill certain requirements, he is also able to determine whether or not he is willing to submit to arbitration, the Chamber undertook to have the laws changed in the State of New York, making such clauses in contracts irrevocable. After a campaign lasting seven years, the Legislature of the State of New York in 1920 passed a law making arbitration clauses in contracts irrevocable. This law has since been sustained by the higher courts of the State. The Chamber's Committee has, for many years, been in communication with Governors, members of Legislatures and commercial bodies in other States of the Union, urging that a similar law be passed. Steps have also been taken to try to secure the passage of a Federal law similar to the law of 1920 passed by the State of New York.

RESULTS

The present system of arbitration as conducted by the Chamber has met with the most gratifying results. While a large and increasing number of formal arbitrations are held, the vast majority of the cases coming before the Chamber are settled before the formal arbitration is called. This is due to the careful and painstaking work done by the Chairman and members of the Chamber's Committee on Arbitration in bringing the parties together to learn the facts before proceeding to arbitrate. In the majority of cases, as stated above, when the parties to the dispute have reached the point where they will sit around the table with a disinterested third party and discuss the case, they agree then and there to a settlement.

NOT CONFINED TO MEMBERS OF CHAMBER

The Chamber's system is not limited to its members nor confined to persons or firms resident in New York.

As a matter of fact, a number of cases have been held in which one of the parties has been a citizen or resident of a foreign land, and in several cases a foreign government has been officially represented as one of the parties to a dispute. Thus far in all the experience of the Chamber, no loser has refused to pay the award or decision rendered, and it has, therefore, never been necessary to have put into effect the law making arbitration awards, when filed in the Supreme Court of the State, enforceable by such Courts.

CO-OPERATION OF THE BAR

In all the recent work of the Chamber's Committee on Arbitration, they have had the hearty co-operation and assistance of the legal profession generally, and especially of the Bar Association of the State of New York.

FIELD AND SCOPE OF ARBITRATION

COMMERCIAL ARBITRATION¹

Commercial arbitration is so well recognized in the United States as to be a business institution. Commodities valued at billions of dollars are bought and sold every year under contracts which provide that differences are to be arbitrated, under auspices and according to rules to which the contracts refer. Exchanges which have trading floors for the convenience of their members usually require their members to settle their disputes by arbitration. The great exchanges upon which grain, cotton and other commodities are bought and sold are well known illustrations.

Where markets have not been organized in exchanges the appropriate trade associations have frequently made it one of their important functions to prepare rules with reference to which their members are expected to contract, in their transactions with one another. Codes of this kind have commonly contained provisions for arbitration, and they have often become of such general adoption as to govern practically all transactions in the commodities to which they relate. It is said, for example, that under the raw silk rules of the Silk Association of America there are sales of this commodity to a value approximating \$300,000,000 a year. In effect, such rules have become the custom of the trade, because they facilitate transactions by making them certain as to what the parties intend to buy and sell. This highly important purpose has been supported by provisions for arbitration through which disputes can be decided practically as they

¹ From pamphlet on *Commercial Arbitration*. Chamber of Commerce of the United States.

arise and so prevented from becoming obstacles in the channels of trade.

Organization of markets for staple commodities has been a task for business men and it has been brought to a high point of development in a business-like manner. To promote facility in the operation of these markets a business man's speedy and definite method of dealing with disputes has been provided. This method is the acceptance of the decision of disinterested but informed business men who are known for their integrity. Without such a method for removing differences, the markets essential to distribution of staples from producers to the industries which use them could not have been developed.

The benefits of arbitration have not been confined, however, to the operation of markets. Organizations which have within their membership business men engaged in many different kinds of industry and commerce have advanced arbitration as a means of settling business disputes with the speed and the conclusiveness that the transaction of business demands. The Chamber of Commerce of the State of New York traces its activities in arbitration backward for 150 years. On the other hand, the Chicago Association of Commerce, with a representation in its membership of 145 divisions in industry and commerce, has recently crystalized its interest in arbitration into a special court.

The Chamber of Commerce of the United States at once after its organization sought to advance the use of arbitration. With important commercial organizations in some Latin-American countries it has arrangements for promoting and facilitating arbitration of disputes which arise in trade between these countries and the United States.

The International Chamber of Commerce has continued the interest in commercial arbitration shown by the International Congress of Chambers of Commerce which held biennial meetings in the years preceding the

European War. The International Chamber is now perfecting plans for encouraging use of arbitration generally in international trade.

Notwithstanding all that has been accomplished toward use of arbitration for settlement of business disputes in the United States, much remains to be done. Some trade organizations which have plans for arbitration have not utilized them to the fullest possible extent. The codes of rules and provisions for arbitration which have been most utilized have been prepared and operated by exchanges and trade organizations the members of which have occasion to buy and sell staples which enter the country's trade in great volume. Other trade organizations can with great advantage to themselves and the public undertake similar functions, even trade associations of manufacturers or merchants who do not ordinarily deal with one another; for their remains for such organizations the field of disputes between their members and their customers in which arbitration can be advantageously employed. Moreover, when the members of one organization habitually have business relations with the members of another, there is opportunity for a joint plan of arbitration to deal with controversies.

Among local commercial organizations likewise there has been real progress, but many organizations which are representative of the business interests in important centers of production and distribution have further opportunities than they have yet utilized.

These opportunities for both trade associations and local commercial organizations are not confined to the encouragement of arbitration. When a business question comes to the attention of an organization, or the agency it has created to act in such matters, the question may not have become so acute that the parties have taken definitely adverse positions. They may rather be in the attitude of having queries about what has taken place and respecting their rights and obligations. There is accord-

ingly room for the use of good offices, to render which an association of business men is so peculiarly fitted as to have a duty, both to its members and to the public. Good offices, when exerted successfully, assist the parties to discover the real causes of their doubts and differences and to reach an amicable adjustment upon a mutually satisfactory basis. So long as the possibility of such a conclusion remains, it is obvious that resort to arbitration would be premature.

Commercial arbitration is a strictly constructive movement. It is at once profoundly idealistic and intensely practical.

It stands for the ideal of peace, fairness, and honor, yet it offers material gains that may be translated into terms of money and good business.

Commercial arbitration provides a prompt, fair, and intelligent adjustment of differences between merchants in any country or countries through the impartial and equitable judgment of men trusted by both parties and chosen for expert knowledge of the business in dispute. The submission is voluntary. The award leaves no sting behind.

Commercial arbitration would remove, by voluntary agreement of the contracting parties, a mass of commercial litigation from the operation of courts, leaving the latter free to deal more promptly with matters that can not be solved without judiciary intervention.

Commercial arbitration has obtained a strong hold upon the mind of the progressive element in the mercantile communities everywhere. American and foreign trade bodies are rapidly multiplying arbitration facilities so that in the near future arbitration will be freely accessible to merchants in all classes of business and in all communities. The Department of Commerce has gladly cooperated with various phases of the movement.

The problem of commercial arbitration is one that

must appeal to the producer, to the merchant, and to the consumer, for it is essentially a movement for the elimination of waste and the prevention of loss.—*Commerce Reports, Washington, D.C. May. 14, 1923. p. 411.*

THE NEED OF ARBITRATION TO RELIEVE THE CONGESTION IN THE COURTS²

I yield to no man in my respect for law or in my devotion and loyalty to the courts, but I may be pardoned for some suggestions in the way of improvement, when the present administration of justice has been called by the leaders of the bar, by Elihu Root, by William Howard Taft, by Dean Stone, by many of their high standing, a reproach to the bar.

I propose frankly to lay before you some defects in the administration of justice, as I view them, after an experience of a quarter of a century, because the only way in which to remedy a defect is to see it, and to analyze it, not to turn your back on it, or stick your head into the sand like the ostrich, believing it doesn't exist because it is then no longer visible.

The first defect in the administration of justice and the one which has done most to lessen the respect of the people for justice and for its administration under our law and by our courts, is what is commonly known as "the law's delays." Shakespeare speaks of it in Hamlet's soliloquy. Dickens mocks it in "Bleak House," he tells us about the case of Jarndyce against Jarndyce that lay for over one hundred years in the Court of Chancery, and no two men engaged as advocates in that important case understood the real issue involved.

In New York county six years ago there were 8,000 cases upon the calendar. January 1st this year there were 26,000 or an increase of 18,000. The Supreme Court

² By Honorable Moses H. Grossman. *Academy of Political Science Proceedings. 10: 517. July, 1923.*

can absorb only from eight to nine thousand a year; so it is a very simple mathematical calculation to determine that the average ordinary case cannot be reached for trial in less than two and a half or three years. I insist that when a man under the protection of his government demands justice, he is entitled to justice, at once, and he ought not to be told by his government that it is impotent to grant him the justice he demands.

The Constitution concedes three inalienable rights; the right to life and to liberty and to the pursuit of happiness. But I say that injustice costs us our lives, robs us of our liberty, and that we cannot pursue our happiness when it is impossible to dispose of litigation until years have elapsed.

We lawyers are asking merchants to come to us and let us solve their problems and yet we confess ourselves impotent to deal with our own important problem of speeding justice. As Elihu Root said at a meeting of the American Bar Association a year ago, "these technicalities of the law, these interminable delays are a reflection upon us lawyers and a reproach upon our profession."

But there is a remedy. The remedy is at hand and it is gratifying that there is now functioning in the city of New York a court of arbitration in which you can have your disputes and controversies tried tomorrow. Any two disputants having any controversial issue upon which an action can be brought except a matrimonial controversy or one involving the title to real property, may enter that tribunal and have a trial in a day, in three days or a week, before men of the highest character, learning, standing, and special knowledge of the issue.

The law as amended three years ago permits you to choose you own arbitrators. When you have chosen them they have the power of a judge to issue subpoenas, compel production of books and papers, to hear the evidence and to render a final decision, which on motion, is crystallized by the court into a judgment and is enforced.

ible as would be a judgment entered upon the verdict of a jury.

No one can complain because the law which he must now respect better than ever has given him a sure remedy against delay.

I have given attention to Dean Stone's interesting paper ("The Scope and Limitations of Commercial Arbitration"), on the principle of arbitration and to his keen analysis of the existing statute, his criticisms upon the dangers in the propaganda employed for the advancement of arbitration, his exposition of the defects in the statute and his suggested remedy for their cure. With much that he said I am in thorough accord, but there is, nevertheless, a great deal with which I cannot agree. That the system of arbitration as thus far developed has imperfections that can be improved does not admit of doubt, but we must bear in mind the admonition of Dr. Johnson whose learned philosopher Imlac teaches us that if all difficulties are to be overcome in advance no project will ever be undertaken.

Zeal for the propagation of the doctrine and principle of arbitration should not be dampened nor diminished nor should its scope be limited because in an exceptional case the protection it may afford may not involve all the remedies that the courts in their plenary powers possess.

Let but the principle of arbitration become widely accepted and its general practice adopted and the powers of this tribunal will doubtless be increased to meet all exigencies of the situation.

Again, I must take issue with my learned colleague in his conclusion that the solution of controversies by arbitration is not desirable where the controversy is intricate and the law applicable is doubtful. His premise that such controversy will be submitted to arbitrators untrained in law and inexperienced in the conduct of trials is erroneous. The selection of the arbitrators will always be made

⁸ See p. 129 of this volume.

with due consideration of the case in hand. So far at least as the triers of fact are concerned, the Tribunal of Arbitration will excel the average jury in point of qualification. There is no reason why in such exceptional cases the arbitrators should not be composed of jurists of the highest type, profoundly versed in law, acting in combination with laymen most skilled and experienced in the matter in controversy. I concur with his view that the arbitrators like referees should be removable for misconduct. That principle is beyond question, but so rarely will cases of misconduct arise that the advocacy of arbitration and the zeal for its adoption should not be thereby delayed or impeded. Indeed, a partial remedy already exists for misconduct in that the award of an arbitrator so offending will not be confirmed by the court. Dean Stone suggests also that arbitrators should be subject to the control of the court in the same way and to the same extent as referees appointed by the court are subject to control. If such control be limited to cases of their misconduct the remedy proposed is unobjectionable but if by this "court control" their rulings upon evidence or the formalities of the proceedings are rendered akin to court proceedings the whole object of arbitrating instead of litigating would be frustrated.

The conclusion which the learned gentleman has reached that the scope of arbitration should be limited to particular phases of controversies arising in particular trades and businesses, is one from which I thoroughly dissent. That he has reached such a conclusion is due to the basic errors into which he has fallen which I have just endeavored to point out. Such a limitation of the principle and use of arbitration would subvert the statute which has been the inspiration of the recent efforts for the extension of arbitration. It would make arbitration merely a convenient mode of disposing of some incidental question in a controversy rather than the controversy itself. Again, the statute provides for the application and

use of arbitration generally in practically all forms of action. Such a limitation would restrict it merely to commercial disputes and then only to special phases of such disputes, somewhat akin to the ascertainment by appraisal of the amount of loss by fire under the appraisal clause of an insurance policy, whereby notwithstanding the ascertainment of such amount all questions of liability are still left open for adjudication. Such a limitation would place the matter almost where it was before the adoption of the statute and put it in the same situation of innocuous desuetude which it then enjoyed.

I do not care how complicated are the facts submitted to the Tribunal of Arbitration; the more complicated they are, the more efficiently will this new Court of Arbitration dispose of them. I do not care how complicated may be the issue of law, should it arise in the course of the trial, this tribunal, with legislation to supplement existing law, is very able to take care of it.

All that I wish to add in conclusion to demonstrate the efficacy of this new tribunal is this: we do not interfere with existing courts of law. We are not competitors; we are supplemental; we are cooperating with them.

The purpose of the establishment of our tribunal was to relieve the increasing congestion of the calendars in our courts of law, and to divert the flow into this tribunal, so that especially those issues of fact, which have no place in a court of law, which can be better determined elsewhere, may not clog and clutter up the calendars of the courts of law to the detriment of the litigants and of the judges, who are seriously overburdened, who are unable to cope with the mass of litigation, and whose time should be devoted to the consideration of questions of law. They should not be required to sit weeks at a time listening to evidence as it emanates from the mouths of conflicting witnesses without a question of law being raised in all that time.

A very eminent judge of the Circuit Court of Appeals at the inaugural of our court said that he had sat for five weeks in a case just concluded where the issue was one of accountancy. The expert accountants for the plaintiff swore to one theory, the expert accountants for the defendant proposed an entirely different theory and they furnished another result; and for those five long weeks, in which this eminent judge could have done important constructive work in the examination of briefs and the solution of legal problems, he sat upon the bench with twelve men, as he stated, without having in that jury box even a bookkeeper, much less an accountant; and there they were in a maze of figures, the law imposing upon them the duty of passing upon that technical issue which was beyond their ability to understand or determine.

In our tribunal we would proceed as follows: we would say, "What is the issue—an accountancy issue? Well, we will have accountants." That is reasonable, isn't it? That is intelligent, isn't it? We would say, "Employ not three experts on each side to befuddle the jury, to swear against each other, but three experts altogether, each of you paying half the expense to decide the question. Then you will get absolute justice because they have knowledge of the issue."

There are after all only three elements necessary in any judge, or juror, or arbitrator—integrity, intelligence and knowledge of the issue. And knowledge is not the least important because I don't care how honest a man is, how intelligent he is, if he hasn't knowledge of the issue, he can not pass upon it justly or intelligently.

I do not contend that arbitration is a universal panacea for all our social ills, but there can be no doubt that, intelligently applied and administered, it will prove a most serviceable, efficient and admirable corrective for one of the law's age-old and most intolerable evils—the law's delay.

THE ADVANTAGES OF ARBITRATION PROCEDURE⁴

As the trend of business becomes more complex, misunderstandings and disputes are bound to occur in increasing number. These everyday ordinary misunderstandings and disputes must be faced; they cannot be ignored. To litigate, the most wasteful procedure to which a business man can resort, means strife, expense, annoyance and the rupture of business friendship, sapping the very lifeblood of commerce. The application of some other less wasteful method for the settlement of such differences and disputes becomes imperative. Aside from settlement by negotiation between the parties direct or through the medium of a third neutral person, we have but one alternative—formal arbitration conducted in accordance with the provisions of the law and the wise safeguards which it provides. Such arbitration, under the auspices of responsible organizations, is a sane, speedy and inexpensive method of settlement by which, according to my own knowledge, there is a sound determination of the true merits by men experienced in the technique of the matter involved, with less compromising or splitting of differences than we find in the jury room.

Arbitration saves time, trouble and money not only to the disputants but to the state as well, freeing congested court calendars, particularly in large centers, and permitting the courts to devote their energy to matters for which they are specially organized, and which they are better fitted to handle. Arbitration will also relieve the law office of the many irksome litigious commercial matters that never pay either for the time or expense connected therewith. An unprejudiced attitude must develop the conviction that some disputes which cannot be disposed

⁴ By Charles L. Bernheimer, chairman of the Committee on Arbitration of the New York State Chamber of Commerce. *Annals of the American Academy*. March, 1926.

of by negotiation should never be arbitrated, while others should never be litigated. No merchant should make an agreement⁶ to arbitrate without the advice of his counsel. A necessary step in the procedure is that the merchant should determine in advance the forum under whose auspices the arbitration shall take place.

Arbitration is indeed older than the recollection of man. It is a human invention born of necessity, and hence not free from the usual worldly shortcomings. The claim that it is an unfailing panacea for all business ills is as fallacious as the claim that the law is the perfection of reason, but arbitration shares with the law the distinction of being the best preventive remedy we have at our command.

After a struggle waged through the centuries, arbitration is coming into its own, and when President Coolidge signed the Federal Arbitration Law, he issued what may properly be termed a modern proclamation of emancipation, freeing business from the chains which bound it for more than three hundred years. It was in 1609 that Lord Coke, pronounced his now famous dictum in *Vynior's* case, in which it was maintained that "a man cannot by his own act make such authority, power or warrant not countermandable which is by the law and its own nature countermandable." This ancient dictum has hampered

⁶ Standard arbitration clauses suggested for contracts involving matters between residents and citizens of the state of New York, though in using these clauses it is at all times advisable that the parties consult their counsel in order to make either of these clauses fit their particular requirements:

- (1) Any dispute arising under, out of, or in connection with or in relation to this contract, shall be submitted to arbitration in accordance with the laws of the state of New York.
- (2) Any dispute arising under, out of, or in connection with or in relation to this contract, shall be submitted to arbitration under the rules of the Committee on Arbitration of the . . . of the state of New York, which rules we, the parties hereto, have read and do hereby accept.

The following clause is offered for use in connection with the new Federal Arbitration Act which becomes effective January 1, 1926, and this, too, is suggested with the advice above stated; namely, to consult counsel in regard to its application before making use thereof:

Any and all controversies arising under or out of or in connection with or relating to the agreement of which this is a part shall be submitted to arbitration, and judgment upon any award rendered may be entered in the highest court of the forum, state or Federal, having jurisdiction in the premises.

business ever since. Through the medium of the new Federal Arbitration Law, insofar as interstate and foreign trade and admiralty matters are concerned, the present day merchant can agree to outlaw unnecessary litigation in the settlement of his everyday trade disputes by substituting orderly, inexpensive and speedy arbitration under the guardianship of the courts.

WORTHY EXPONENTS OF THE VALUE OF ARBITRATION

George Washington recognized and appreciated the value of arbitration. This is tersely and clearly indicated in his last will and testament, in which he stipulated that the disputants were each to select a man "known for probity and good understanding, and these two to select a third;" the will then continued:

These three men, thus chosen, shall, unfettered by law or legal constructions, declare their sense of the testator's intention; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States.

Abraham Lincoln also recognized the value of arbitration and its twin sisters, mediation and conciliation, for it was he who said:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.

Coming down to our own contemporaries, Chief Justice Taft some few years ago wrote:

Arbitration is nothing but the combination of negotiation and the voluntary settlement by contract. With the burden of litigation that we have, which really defeats the object of the courts, the courts should welcome arbitration.

Taking as a basis the opinions of these three great leaders in American history, is it not more than a coincidence that President Coolidge signed the Federal Arbi-

tration Law on February 12, 1925, the birthday of Abraham Lincoln? Those of us who for years struggled for a Federal arbitration law consider this an omen of great good.

VALUE OF ARBITRATION TO POOR MAN

Arbitration fulfills another function—one that has an important sociological aspect in addition to the many points heretofore enumerated. It provides a forum admirably adapted for the settlement of the troubles of the small man or the poor man who cannot stand the stress and expense of protracted litigation. It furnishes him a method and facilities for solving his difficulties speedily, equitably and economically. In such states as New York, New Jersey and several others, as well as in interstate trading (through the provisions of the new Federal Arbitration Act) he can secure an award on the basis of which a judgment may be procured in the event of default. Arbitration permits of a quick determination at nominal costs. It frees the disputants to follow their daily tasks uninterruptedly, relieves them of the mental anxiety of a court procedure and the tying up of funds for months or years, and the party in the right obtains substantial justice on the precise point on which a decision is sought, rather than, as often happens in court procedure because of the necessary application of general rules, obtaining a decision based on technical points with which he had no concern whatever. Rarely is business friendship, no matter of what length or standing, continued after legal proceedings are brought; on the other hand, such friendships are in most instances maintained, if differences are disposed of by arbitration.

The poor man or the small man cannot afford litigation. His financially stronger opponent can fatigue him into submission. The poor man cannot employ attorneys of standing; he cannot afford the necessary time or any of the other hundreds of things which are required to

successfully carry out a lawsuit. He can let the disputed matter go by the boards, but how often can he afford it? And if through circumstances he is compelled to accept what is to him an injustice, bitterness eventually becomes a festering sore. The only known alternative to a lawsuit, or acceptance by duress, is arbitration under the auspices of an established and recognized institution with proper arbitration facilities. At the New York Chamber of Commerce we have at no time discriminated against any case because of the smallness of the amount involved. Indeed, we have encouraged the poor man to come to us with his troubles and we have never refused to help him to the same extent that we have helped his more fortunate brother.

TYPES OF CASES HANDLED

Only a few days ago a lady in a far-off country complained that she had given and paid for an order of hair dye involving less than two dollars. The dye had never reached her and, as she wrote, her annoyance and discomfort were beyond description. She pleaded with our Chamber for assistance—she needed the dye. On inquiry at the office of the New York concern it was discovered that an employee had mislaid not only the order but the remittance as well. With the discovery, the wrong was quickly righted and the lady's equanimity restored.

Another recent case is that of a small dealer in a Pacific island who had placed an order with a New York house for merchandise amounting to but nine dollars. The order was given on the basis of a circular which read that the money would be promptly refunded if the goods on arrival were found to be unsatisfactory. When the merchandise (hats being the commodity in this instance) reached their destination, they were found to be of a style obsolete for many years and out of place most anywhere, no matter how remote. In accordance with the circular they were returned to the shipper by parcel post, but the

New York concern refused to accept them because they were improperly packed, so they said, when reshipped. Consequently they floated out towards the Pacific again with instructions to the buyer to properly repack them. This time the buyer crated the hats and sent them by express, thus incurring a freight cost amounting to about half of the total of the invoice. The New York house then refused them because of the express charges involved. It was at this point that the buyer called for the assistance of the New York Chamber of Commerce. The seller (New York) at first offered to the buyer about one-third of the original cost, but after the Chamber pointed out the various aspects of the case and the import of the circular, the seller decided to refund the full amount, plus postage.

A lady in Ohio who earned her living by raising canaries recently advised our Chamber that she had remitted a check for \$11.50 to a New York house for a quantity of bird seed, the maintenance of her vast flock. Although her check had been cashed and returned to her cancelled by the bank, to her great distress and that of her hundred birds, the seed did not reach her. Upon investigation we found that the concern had gone into bankruptcy, the receiver claiming that the check had gone through just before his appointment. However, the matter was brought to the attention of the former owner of the business, who personally saw to it that the worthy lady and her feathered charges received a quantity of bird seed sufficient to cover her remittance.

In another instance our committee's help was solicited by a contributor of an illustrated article to a scientific magazine—a large effort on the part of the author. The price for the article was fifteen dollars. Although the article had appeared, the writer had not been able to collect the fifteen dollars, nor had the publishers even replied to his letters. The young man, who naturally was filled with righteous indignation, suggested to us that the mat-

ter be referred to the postal department or at least that the publisher should be threatened with legal action. However, our injection into the situation brought about an examination of the publisher's records. He discovered the error and promptly made good.

Indeed, many cases come to us during the year involving small amounts. For instance, cases of subscription to this or that magazine, none amounting to more than two dollars—cases of petty accounts with mail order houses, etc.—all of these our Arbitration Committee takes hold of and in the majority of them we are successful in bringing about an amicable disposition. These extremely small cases are handled on a basis of mediation and conciliation, thus even saving the expense of formal arbitration. Our Chamber makes no charge whatever for this service, thus assisting the small or poor man.

Reginald Heber Smith, in his report to the Carnegie Foundation for the Advancement of Teaching, published in 1919, in its bulletin number thirteen, entitled *Justice and the Poor*, stated:

The inability of the poor to pay for the services of counsel has often been stated, and the general fact is known. The vast number of persons who are thus debarred from legal advice and the essential services of the lawyer in court, however, is not realized. . . .

In their effect on the problem of denial of justice and in the solution that they afford, small claims courts, conciliation, and arbitration have much in common. In all three court costs cease to prohibit, for they have been minimized or abolished. The proceedings, in their very nature, make despatch easy and delay difficult. In parallel ways they avoid the fundamental difficulty of the expense of counsel by making the employment of attorneys unnecessary. In all conciliation, in the large proportion of small claims, and generally in matters submitted to arbitration, after rules of pleadings, procedure, and evidence have been eliminated, there is nothing left for the lawyer to do. . . .

ARBITRATION AND THE ACCOUNTANT^{*}

At the annual meeting of the American Institute of Accountants, held in September, 1923, at Washington, the following resolution was adopted:

Resolved, That the Institute give to the work of the Arbitration Society of America its support; that it communicate with its members throughout the country, urging them to be favorable to the introduction of the system of arbitration in commercial disputes, and generally do everything possible to forward the popularity of arbitration, including service as arbitrators when called upon so to act.

The New York State Society of Certified Public Accountants at its annual meeting May 14, 1923, adopted a similar resolution, providing:

That the president be authorized to appoint a committee on arbitration, to consist of twenty members, to coöperate with the Arbitration Society of America, but without power to commit the society in any way.

Such a committee of twenty members of the New York State Society was subsequently appointed. The committee met in formal session and its report to the board of directors was transmitted by the board to the society at its regular monthly meeting on October 8, 1923, as the result of which the society voted to recommend to its committee on lectures and entertainments that it devote part of its regular monthly meeting on November 12, 1923, to addresses on the subject of arbitration with opportunity for full and free discussion.

A better understanding of the purposes, practices and benefits of arbitration on the part of the members of our profession, and in particular of the members of our Institute, of the New York State Society and other state societies, will no doubt prove of interest and lead to closer touch and contact with the subject of arbitration and its

^{*} By W. F. Weiss. *Journal of Accountancy*. 36: 327. November, 1923.

modern application to the lawful determination of business disputes and controversies, in preference to the economic waste of litigation. The substitution of arbitration for litigation is now sanctioned under the statute law of New York. In fact, this short-cut to substantial justice, which may appear to savor of dangerous radicalism to the unformed, has not only the sanction of the law, but the support of our courts and the cordial endorsement of many of our foremost judges, ablest lawyers and greatest merchants.

In accountants' growing intimate touch with the administration and pursuit of business, we must observe that the present enormous increase of litigation and consequent congestion of our court calendars have resulted in irksome and vexatious delays in the administration of justice, breeding disrespect of the law and dissatisfaction among the business community.

In 1920 the legislature of the state of New York enacted a law, which was signed by the governor on April 14th of that year, to bring relief from these cumbersome, irritating conditions through arbitration. That law gives to all disputants in New York the right to submit their differences for final determination to arbitrators, selected by themselves. That law also confers upon such arbitrators the full powers of judges; makes an arbitration agreement irrevocable, and gives to the award of an arbitrator the full power and sanctity of the judgment of a court of law.

What are the possibilities that await the accountant in this new field of arbitration? Will it broaden the scope of his professional services and usefulness?

This will be a practical and very natural query in the minds of many accountants, and as such it merits fair consideration and frank discussion. While I fully realize that the question of profit in dollars and cents will not weigh in the balance against a service for the public good with the members of our profession, yet the accountant,

notwithstanding his professional attainments, is essentially a man of business and has a moral and ethical right to consider such a question.

To my mind, the popularizing of this direct and simple method of determining business controversies will doubtless increase the present and open new avenues of service to the accountant. This appears to be the conviction of the closest students of the business situation, who are following every step in the rapid progress of arbitration, analyzing its trend and classifying its requirements as they reveal themselves. The impression is prevalent among skilled observers that the accountant is destined to take rank as one eminently well qualified among trained and competent men of the professions and of business to act efficiently in the semi-judicial rôle of arbitrator, either alone or in association with others, as the disputants may elect.

Acting as arbitrator, however, is only one of the opportunities open to members of our profession. In the development and spread of arbitration practice, the accountant's value as a competent, efficient witness, consultant or advisor to the disputants will materially increase. Similar opportunity in this respect existed heretofore in serving litigants, but it was often limited, whereas in arbitration practice it will naturally expand. The limitation often arose from those rigid and complicated rules of evidence and the regrettably frequent use of objections, on the alleged but purely technical ground that testimony was irrelevant, immaterial or incompetent, whereunder so often truth has been silenced, insurmountable barriers has been raised to the admission of all the facts, and justice skilfully and effectively sandbagged.

There are no technicalities in arbitration. Arbitrators, while they will exclude unrelated matters, which are time-consuming and may becloud the issue, are not bound by the rules of evidence, and all evidence bearing upon the case may be freely admitted. It is a simple, demo-

cratic procedure in which every disputant and every witness gives his evidence in his own way, before arbitrators selected by the disputants themselves for their integrity, intelligence, trustworthiness and special fitness to decide the particular issue.

By virtue of these provisions arbitration is bound to grow and, it does not seem visionary to say, will eventually largely divert from our courts those thousands upon thousands of cases, which embody on real analysis merely simple issues of fact yet sadly clog the court procedure and calendars and retard the administration of justice. I refer to cases involving only an issue of fact, where it seems a waste of time for a judge to hear the evidence, when he could be better engaged in consideration of questions of law, while at the same time there are men available better qualified to pass upon the particular question of fact than the average jury.

All things considered, it is not an unreasonable prophecy to predict for the accountant, skilled in the affairs of business, and experienced and accurate in the disclosure and demonstration of facts, a continually expanding field for his professional services and usefulness as witness, consultant and advisor.

As to the question of emoluments, and not referring to the services which may be rendered to either of the disputants on customary retainer arrangements, it may be expected that the arbitrators, unless they have registered their willingness to serve without compensation, will be remunerated in proportion to the importance of the issues upon which they sit in judgment, with some regard also for the economy in expense and expeditious procedure afforded to the disputants. But apart from the question of the financial emoluments for the arbitrator, the honor, dignity and benefit of such service to the business public will naturally constitute distinct and separate recompense and credit of great value.

THE TECHNIQUE OF ARBITRATION¹

In theory arbitration is admirably simple. Deceptively so, perhaps, in view of the tremendous significance of its function. In practice its simplicity enables it to adapt itself to a wide diversity of uses and this makes a study of its technique important.

The essence of the arbitration statute is its recognition of the right to submit controversies and to file the award in a competent court, where it becomes a judgment. Such acts wisely refrain from laying down elaborate rules for arbitrators to follow. But rules which are regulatory only, conferring no substantive rights, are needed, and these are properly adopted by trade associations to apply to arbitrations submitted by members or others who find them applicable. It is appropriate that the agreement to arbitrate, or the submission of a controversy, should specify the rules of a particular trade association or the standard rules of some organization which encourages arbitration.

Inasmuch as association practices will differ and various kinds of controversies will require special rules, there is considerable technique involved. Failure to recognize this fact will lead to disappointment. Here lies the special field of usefulness for the associations which devote part or all of their activities to converting the public to the benefits of arbitration. They need to keep their minds open as to methods of arbitrating, which are numerous and sure to increase in number.

Until recently the commonest form of procedure in this country consisted of the appointment of an arbitrator by each party, the two so appointed to select the third. This appears to be the least satisfactory of all known methods, because two members of the board are biased, and the third will receive little disinterested assistance from them. This third arbitrator, who virtually exercises

¹ From *American Judicature Society. Journal.* 9: 71. October, 1925.

the whole power of decision, is not directly selected by the parties. Under this arrangement a losing party is likely to feel that he has not been treated fairly.

Probably the commonest procedure, and the most satisfactory, is for the parties to agree upon one arbitrator. When obliged to concur in a choice the arbitrator so selected is likely to be one of high standing whose decision will carry weight.

But conditions will not always make this simple method applicable. If the parties are engaged in different lines of business there may be no trade expert known to both of them. In such case there is opportunity to agree upon a lawyer with the expectation that he will inform himself concerning the technicalities of business involved in the controversy. Or the parties may submit their dispute to a standing committee on arbitration made up of three or five business men of varied experience.

In building contracts the architect is commonly made the arbiter of disputes in the first instance and those that he cannot resolve are usually passed on to a board of three, likely to be composed of an architect and two contractors, or of three architects.

In the more compact trade bodies which find it necessary to oblige members to submit their disputes to arbitration there is commonly a standing committee (or perhaps more than one committee) that arbitrates all the cases.

In the spread of arbitration in lines of business which embraces buyers and sellers who are not members of a single association it is becoming common to maintain a single salaried arbitrator, often a lawyer, who becomes familiar with the entire field of business. The success of professional arbitrators of this sort in recent years has been most convincing.

There is already a considerable experience in this country to draw from and opportunity for adapting the idea in flexible manner to meet diversified needs.

One of the instances of the successful working of arbitration over a long period which is often overlooked is in the baseball business. Not infrequently the standing of individual clubs depends upon decisions on appeal from the field umpire. For this purpose the baseball managers developed a system which has worked admirably.

WHERE JURY TRIAL FAILS^{*}

It is possible to assert in a single sentence that jury trial is the greatest achievement of the common law and that jury trial is the greatest incubus attached to justice. In fact, so long as we speak of jury trial as though it were a single idea and procedure, we convey no real meaning by lauding it or by condemning it.

There are three broad classes of jury trials, namely, criminal trials, trials in tort actions, and trials in contract actions. To say that jury trial is this or that without saying what kind of a jury trial is meant, is to express nothing.

There is no proposal anywhere to do away with jury trial in criminal cases, though, as a matter of practice we are obliged to try a very large proportion of minor criminal cases without a jury. There is criticism of jury trial in criminal cases where it has degenerated. It is to be hoped most emphatically that reform will come through reversion to correct principles before the scandal is so great that dangerous experiments will be indulged by an outraged citizenship. To be more explicit: jury trial in criminal cases has all but broken down in Cook County, Illinois. There is no need here for particulars. The results speak for themselves and among these results we note a recent editorial in a leading Chicago paper, counselling officers of the law to rid the community of known crooks by strong arm methods, by waylaying them and beating them up, and by shooting whenever

^{*} From *American Judicature Society. Journal*. 9: 71. October, 1925.

provocation is offered. This advice was followed in less than a week by a long interview in another conservative Chicago paper in which a certain police captain threatened to kill a certain "gangster" as soon as he could get him within range. The public appears not to comment upon these articles, but to take them as a matter of course. The New York Times, a few years ago, published a signed article in which specific instances of way-laying and beating criminals were presented. In many cities the police have been driven by the failure of criminal justice, largely through the perversion of jury trial, to resort to the third degree, which is seen to visit brutality on innocent persons in many cases and to fail often in securing convictions of those apparently guilty.

But where jury trial has not been perverted, it holds its own as the best adjunct to criminal procedure that has ever been devised, and the only feature of common law procedure which has spread throughout the world. Other nations have experimented with the jury in civil litigation and have discarded it.

The success of jury trials in tort actions in the past fifty years in England justifies the belief that there is a class of cases, particularly defamation, breach of promise and the like, in which the jury, rightly employed, is fully justified by results. But in this country, where in most states the jury was deprived of the assistance from the judge, the results in personal injury cases were so unsatisfactory as to form a strong argument for workmen's compensation acts, which have greatly reduced this class of cases.

When we come to the use of the jury in contract cases we find the United States divergent from all the rest of the world. In Ontario, for instance, juries are rarely asked for in contract cases and the court has the right to refuse and to discharge a jury at any stage of a trial. In England the jury has virtually disappeared as a factor in contract causes.

At the time when our constitutional guarantees were adopted there could be no foreseeing the perversion of the procedure of the jury trial. Nor could the tremendous volume of highly intricate and technical commercial causes be foreseen. We have preserved the right to demand jury trial for all but the least important cases at law as a constitutional guaranty, and one which cannot be uprooted by agitation for constitutional amendment. Let all the enlightened members of the community agree on effort to limit the right to jury trial in contract cases by constitutional amendment, and nothing would result at this time in a single state, because the meanest pettifogger and demagogue could defeat the movement. There must be much greater popular confidence in judges and much greater solidarity and information on the part of the bar before a direct reform can be accomplished.

Meanwhile insistent need finds opportunities to reduce the volume of civil jury trials. Workmen's compensation acts make a notable reduction. In the field of small claims informal procedure makes headway. Now comes arbitration as an important aid to the relief of the business world.

JURY IS DEBTOR'S FRIEND

Much is to be said of the jury as an agency inherently unsuited to comprehending involved commercial causes. Most jurors in such cases have to be educated ad hoc at a great waste of energy and time. Education obtained through expert witnesses limited to rules of evidence is a costly and uncertain thing at the best. The temptation to interfere with the course of instruction by injecting emotional elements is often too strong.

There are other limitations, some possibly more objectionable. It is the jury that causes most of the waste of time, both before trial and during trial. We have set up courts presumed to be sufficient in number to meet the demand and in all large cities they are numerous. But we

have not provided administrative authority within the judicial system with the power and responsibility to get the work done promptly. Individual judges cannot afford to make themselves unpopular by crowding lawyers. They must waste much of their time in hearing and allowing motions for continuance. Congestion on the calendar is inevitable. Here comes the greatest evil, for as soon as there is congestion there is a premium offered to persons who are unscrupulous, or financially embarrassed, or merely angry. They have only to spurn offers of settlement, force claimants to sue, demand jury trial and so gain perhaps a year, perhaps several years.

All this is really unfair to the courts. It means that valid claims must wait while spurious ones take up the court's time. We lack a system of punitive costs. The courts lack an organized form necessary to enforce measures of relief. Courts come to exist largely for the comfort and protection of debtors in a manner wholly contrary to our exalted principles of doing justice. Many claims are abandoned or compromised unfairly to escape the greater penalty of litigation. Business suffers indirectly as it always must suffer when law is unenforcible. Many lawyers refrain from protest because they chance to have about as many clients who profit from delay as those who suffer from it.

As against the delays and the uncertainty and the irresponsibility of jurors commercial arbitration offers opportunity for the parties to select an arbitrator to be their judge from those whom they consider to stand highest in their branch of trade by reason of experience, personal qualifications and proved integrity. It is a tremendous moral advantage to approach the forum with entire confidence. The hearing tends to be a fair and open matching of facts instead of a contest of concealment. The arbitrator needs only the facts. He knows the custom of the trade, and it is difficult to deceive him on the facts. All the stage play of the jury courtroom is

dispensed with. The right environment for adjudicating business disputes has been created and the more complex they are the more emphatic will be the advantage over jury trial.

HOW TRADE ASSOCIATIONS USE ARBITRATION

CONDITIONS ESSENTIAL TO SUCCESS OF ARBITRATION¹

The settlement of international trade disputes by commercial arbitration, making it possible for honorable merchants in different countries to avoid the delay, the expense, and the loss of business friendship incidental to litigation, is a movement which the United States Department of Commerce has consistently encouraged. The conditions essential for the success of commercial arbitration as a practical recourse of the business community in differences arising in domestic and foreign trading may be summarized thus:

1. The existence in the commercial community of a sincere desire to act squarely and to submit to arbitration in order to remedy the effect of failure to comply with contract requirements through error, negligence, or bad faith of employees.

2. The inclusion of a clause in contract agreements between firms in different countries to submit to arbitration any disputes arising from the contract.

3. The existence of trustworthy institutions in both countries capable of acting fairly and conscientiously in matters submitted for arbitration.

4. The appointment by these organizations of experts or advisors capable of giving an unbiased opinion in matters affecting quality and quantity disputes in shipments, trade usages, etc.—matters requiring expert knowledge of specific commodities and trade customs.

5. The existence of national laws and international agreements making arbitration awards valid, irrevocable, and enforceable.

¹ By A. J. Wolfe *Commerce Reports*. Washington, D.C. March 19, 1923. p. 760.

Commercial arbitration will not be successful if it does not provide for an expeditious handling of the dispute. In other words, arbitration should be undertaken either where the goods are or where the contract originated, according to provisions in the contract, but should not be sent for review to a third country. Anything that takes the adjudication away from the residence of the parties and the location of the goods adds to the cumbersome nature of the procedure and defeats the purpose of commercial arbitration in those multitudinous minor disputes which form the bulk of arbitration cases. On the other hand, an international court for disputes of unusual importance would probably be an excellent thing.

THE SIGNIFICANCE OF ARBITRATION IN THE MOTION PICTURE INDUSTRY²

In the motion picture industry there are three great interests, or groups of interests, operating toward the end that the public may have this form of entertainment.

First, there is the producer, the man who buys the story which is to be told on the screen, who engages the players and those who direct their actions, who has the studio in which the multitude of scenes making up a photoplay are taken, and who sees to the developing and printing of the film, and its editing and cutting into proper sequence and length for presentation.

Second, there is the distributor of the films. It is he who purchases or leases the original negative and has made from it a large number of positive prints—the sort you see upon the screen—and leases these for exhibition purposes to those who eventually display them. The number of prints will run, as a rule, between 80 and 200, and they are distributed from 31 different points³ known

² By Courtland Smith, secretary, Motion Picture Producers and Distributors of America, Inc., New York. *Academy of Political Science. Proceedings.* 10: 510. July, 1923.

³ The distributing companies now have exchanges in from 26 to 38 cities, the number varying with the company.

to the industry as "key cities." The distributor's task is one that is difficult, complicated and expensive, to say nothing of being thankless. It is his job to take the picture which may be shown this week, for example, at the Capitol or Rialto or Rivoli Theatre in the center of New York City—the so-called "first-run houses"—and so route it and physically handle it that on certain dates previously arranged for it will be shown at the "second-run" houses, say those on upper Broadway or over in Brooklyn, or in the smaller cities adjacent to New York—or in whichever key city it is being operated from. The prints must be sent to the theatres to which they are leased. Then they must come back to the distributor's headquarters, or exchange, as it is known in the trade. They must be examined for wear and tear. Then they must be sent out again and again until they are shown, finally, in the smallest of hamlets possessing a movie-theatre.

Third in our list of factors which figure in the picture industry before the public sees the photoplay—but by no means the least important factor—is the exhibitor, and by that I mean the man who owns the theatre in which you see your pictures; the man who rents the films from the distributor and sells to you your seats.

I have set forth to you in this brief fashion the character of the work of those engaged in the film industry so that you may have a clearer understanding of the part which arbitration plays in our business. And before I go further into the matter of arbitration as a means of settling differences in the motion picture business, I would like to remark that it is now in operation in 28 of our 31 key cities, and everywhere is meeting with splendid success.³

I hope you will permit me, here to explain some of the difficulties which arise between exhibitors and distributors; and I hope I can do that without unduly criticizing the exhibitor—for he could retaliate by criticizing us (and

³ In 1926 arbitration was in operation in thirty-two cities in the United States and in Canada and in Havana, Cuba.—*Editor*.

by "us" I mean the producer-distributor group) just as severely.

Let me take up, first, the matter of the "play date," which is one that is a question of dispute about as frequently as anything else. It is of the utmost importance that the distributor shall obtain from the exhibitor a specific agreement as to the date on which a certain picture shall be shown, so that he, the distributor, may route the picture to other theatres than the one in question. Let us suppose that a theatre-owner can use two hundred feature pictures, in addition to his short comedies and news reels, in a year. Often, in the past, this exhibitor who can use only two hundred pictures a year has contracted for all he could lay his hands upon—for six hundred or eight hundred or all that are produced by the various companies in America. He has had two reasons for this action—first, perhaps, a desire to keep certain pictures away from his competitor, and, second, because he wanted to choose, picture by picture, the ones he thought most likely to please his especial patrons.

As a consequence of this, our distributing companies have apparently sold a total of eight hundred pictures, let us say, but when it came to the end of the year and we tallied up with this exhibitor, we found we had in reality sold only two hundred. It has become necessary, therefore, to establish in each case of the rental of a picture to a theatre-owner an agreement as to just when that picture shall be shown to the public and then returned to our distribution-exchange for shipment elsewhere. And over the question of the play-date have arisen complaints made by both distributors and exhibitors.

There has not always been complete honesty in the handling of a film by the exhibitor who leased it for showing at his theatre. There has been a practice—more particularly known in the older days rather than now—called "bicycling" a film. That is to say, an exhibitor

who had leased a feature for showing at his own theatre alone, would re-rent to two or three smaller exhibitors—non-competitors of his—during those hours when it was not being shown in his own house. He would, of course, collect from the theatre-owners and keep the proceeds. Later the distributor would find it impossible to lease to the smaller places the feature they had already shown. It is hard to keep track of each individual print of a picture. There was no means of knowing—except by chance—of the “bicycling” of films.

“Protection” is a word which comes up in a great number of motion picture disputes. An exhibitor will charge that the distributor did not properly “protect” him for the showing of a certain picture. Let me explain that word “protection.” The exhibitor, naturally, rents a picture with the understanding that no direct competitor of his—that is, no other house within a very short distance and likely to draw from the same clientèle—is to have the showing of it at the same time, thus diminishing his attendance and his consequent profits. Often, it has been charged, distributors have sold the same picture to adjacent houses, and therefore have not “protected” the original buyer. And then again, it has been complained that distributors have given a certain play-date to exhibitors, who have thereupon at their own expense advertised and exploited the picture, only to have it withdrawn from their available showing-time and set back to some more distant date.

There are innumerable trade differences which I might set forth here. The sums of money involved, as a rule, are not great. While for a showing at the Capitol Theatre in New York the rental price of “Robin Hood” for a week might be \$25,000, “in the sticks” somewhere in Montana, on the other hand, the film might cost the exhibitor only \$40.

As I say, the sums involved are generally so small, the complications are so enormous, the suits are generally

so far away from the home of the distributing companies, and the time wasted in legal procedure is so valuable both to the distributor—whose picture has but an ephemeral value at best—and to the exhibitor—who also has but a brief period in which profitably to show these pictures—that it was inevitable that sooner or later in the film industry we should resort to something more speedy, something more understanding and even more understandable than the courts, something which would bring the differing elements of the business more closely together, and something which would be more really local in its application to their difficulties. The matter of time-saving is of extreme importance. Time is the very vital essence of this film business.

I don't know whether it was chance or whether it was foreordained; but at any rate at the time Mr. Will Hays came into this motion picture industry an opening presented itself whereby the matter might be worked out of bringing distributors and exhibitors around a common table for the discussion and settlement of their disputes. That was just a little more than a year ago. It was in April, 1922. Mr. Hays, as you doubtless know, has always believed in the principle of arbitration and has had considerable experience in working it out.

For almost a solid year we labored over an arbitration plan. It was March, 1923, when the distributors and exhibitors finally accepted what had been drawn up for them. The most difficult thing was to find a way in which it would be possible to make the findings of our arbitration boards "stick." That is not an elegant word, but that was what both sides used. The distributors were concerned lest the exhibitors "run out" on the findings of the arbitration boards, and refuse to accept such findings. And the exhibitors likewise felt that they had to have some definite assurance that it would not be possible for the distributing concerns, which they regarded as large and powerful organizations, to refuse to abide by

the rulings of the arbitration boards. But this was all worked out and a mutually satisfactory arrangement reached.

Our arbitration system, it seems to me, is simplicity itself. There are the same number of arbiters on each side—three distributors and three exhibitors. They know instantly, upon hearing the testimony, the nature of the problem involved, and they realize the justice of one claim or the other. There have been extremely few cases where there has been a tie vote. Such a contingency is amply provided for. First, the six arbiters themselves are requested to name a seventh person as umpire. If they are unable to agree upon such a person, the Chamber of Commerce or Board of Trade of the city wherein the dispute arises is asked to name the seventh arbiter. Where there is no such business body, the Mayor or ranking government official becomes or names the seventh man. Our procedure is very simple, too. The two parties at issue appear before the arbitration board. First the complainant, then the defendant, gives his testimony and proffers whatever documentary evidence there may be. They then withdraw, the six arbiters discuss the merits of the case briefly, and almost always they are able to reach a decision at once. The litigants are then invited to return to the hearing room and are informed of the ruling.

Before the hearing begins, each litigant signs his name to an agreement that he will abide by the board's findings. And there is a penalty which makes him so abide.⁴ In the case of an exhibitor who refuses to accept the result of the arbitration, it is possible for the board to rule that he must deposit a certain sum with each of the distribution exchanges in the city, and keep that sum there (on penalty of receiving no pictures for showing) until his dispute is settled. In some cities there are as many as twenty distributing exchanges. Being obliged to deposit, for example, \$300 with each of these exchanges involves

⁴ See arbitration clause, standard exhibition contract, and rules and regulations relating to arbitration.—*Editor*.

the tying-up of a sum which is considerable to any exhibitor. On the other hand, if the distributor refuses to abide by the arbitration board's decision, he is refused permission to bring any subsequent complaints before that board, until there is full compliance with the award. And being deprived of such permission is a serious matter to him, tying up, as it does, all his claims against all exhibitors with whom he does business. But thus far we have encountered no refusal to accept our board's rulings.

As a practical matter, we have by arbitration overcome in one leap many of the abuses that nearly wrecked the film business. The distributors, I know, have gained the respect of the exhibitors, and they both enjoy far better business relations with each other. We see more clearly their difficulties, and they more clearly see ours. We believe that our arbitration boards will go very far toward eliminating those peculiar conditions and tedious and tiresome difficulties which are unique to our industry and are met with in no other; and I believe further that these better relationships will make it possible to distribute our pictures to the theatres which in turn show them to you, much more quickly, much more fairly, and much more economically.

SUMMARY OF REPORTS OF ARBITRATION BOARDS IN MOTION PICTURE INDUSTRY⁴

1924

- a. 11,197 disputes between distributors and exhibitors involving \$2,119,622.56, were disposed of during the year 1924
- b. 5,697 disputes, involving \$871,035.74 were settled and disposed of without submission to Board of Arbitration between time complaint was made and the meeting of the Boards to hear same

⁴ From *Film Boards of Trade Bulletin*, January 30, 1926.

- c. 4,875 awards, involving \$1,077,968.99, were made by the Boards of Arbitration
- d. 332 disputes, involving \$132,115.48, were withdrawn by complainants
- e. 293 disputes, involving \$38,502.35, were dismissed by Boards of Arbitration
- f. 15 of these disputes required a seventh arbitrator
- g. 520 disputes, involving \$140,234.00, were pending on January 1, 1925
- h. 4 disputes were litigated after arbitration
- i. 1 dispute was litigated before arbitration

1925

- a. 11,887 disputes involving \$2,542,544.40 were disposed of during the year 1925
- b. 4,269 disputes involving \$802,747.69 were settled before submission to Boards of Arbitration
- c. 5,450 awards involving \$1,351,206.72 were made by Boards of Arbitration
- d. 554 disputes involving \$124,797.23 were withdrawn by complainants
- e. 292 disputes involving \$87,147.86 were dismissed by Boards of Arbitration
- f. 22 of these disputes required a seventh arbitrator
- g. 539 disputes involving \$205,216.71 were pending December 31, 1925
- h. 17 disputes were litigated after arbitration
- i. 1 dispute was litigated before arbitration

TYPICAL ARBITRATION CASES ⁵

Case No. 1.

A New York concern sold to the San Francisco Branch of another New York house, for shipment to Argentine, 2500 bags of walnuts grown in Manchuria. A dispute arose as to the quality of the nuts and other elements relating to the contract.

⁵ By Chamber of Commerce of the State of New York.

The matter had drifted for some time when the attorneys for both sides finally decided to submit it to arbitration under the rules of the New York Chamber.

Claims for misrepresentation as to the type of walnuts that were sold, and questions dealing with the surveys of the goods both in San Francisco and Argentine involving the veracity of innumerable people, injected themselves into the hearings. Testimony by commission had to be taken both in San Francisco and Buenos Aires. This dragged the hearings over a period of six or seven months. Further challenging of the testimony which involved additional surveys, prolonged the hearings and added to the ill feeling which existed.

The three arbitrators were all men of the very highest standing. The decision was on a two to one basis. Two of the arbitrators decided in favor of the seller as against one who did not sign his name to the award. The prevailing party could not collect voluntarily,—hence filed his claim in the New York Supreme Court where the award was promptly confirmed. The losing party, however, brought the case to the attention of the Appellate Division of the Supreme Court, and the result there was a complete victory for the prevailing party, in that the Appellate Division confirmed the award without even expressing an opinion.

The struggle on both sides was extremely intensive, and the spirit prevailing between the parties was not always of the very best, but at the hearings decorum was most punctiliously preserved.

Case No. 2.

This matter involved a Chinese firm, with offices in New York, and a New York concern. The controversy related to a purchase of 175 tons of tungsten ore by the New York Company, and involved about \$30,000.

It was submitted to arbitration under the Chamber's auspices. The arbitration required several hearings, and

over one hundred exhibits were submitted before the testimony was closed. A unanimous award in favor of the Chinese firm was finally rendered.

The New York concern took exception to the award, claiming that before the matter went to arbitration the prevailing party had offered to settle for an amount considerably lower than that awarded by the arbitrators, and they therefore asked that the award be corrected to conform to the figure originally offered by the Chinese concern.

The court, however, refused to set aside the award and confirmed the decision in favor of the Chinese firm.

Case No. 3.

This was an extremely interesting matter brought to the New York Chamber's Arbitration Committee in the spring of 1925, involving almost \$170,000. It related to men's underwear bought and delivered in 1919. The buyer declared that the merchandise delivered to him was defective and below the standard stipulated in the contract.

One suit was started in New York County and another in Albany County, and finally a consolidated suit resulted. In 1925 the parties agreed to submit the matter to arbitration under the rules of the Chamber. Both sides were represented by up-state attorneys who were most conscientious and unusually aggressive, and while the attorneys for one side tried to be extremely technical, neither of the attorneys were believers in arbitration.

Amongst the Chamber's membership of 2000, the principals to the dispute could agree only on one particular person as arbitrator. The person so chosen agreed to serve.

The proceedings dragged over eleven hearings, while more than 100 exhibits were placed before the arbitrator during the first three days. When the hearings were finally closed his decision was a clear-cut one in favor of

the buyer. Indeed, I might even say that it was brutally severe, for not only did he decide that the merchandise had to be taken back, and that the monies heretofore paid be refunded at the rate of $4\frac{1}{2}\%$ annum, but also that the storage, insurance, and cartage charges were to be paid by the seller. In addition to this he insisted that the woven labels which had been sewed into the garments bearing the name of the buyer had to be ripped out—a great hardship on the seller.

The arbitrator, as in practically all the instances that come before our Committee, decided in accordance with his best belief and on the basis of his expert knowledge, avoiding all compromise.

The defeated party took exception to the award mainly on the ground that the arbitrator rendered his decision two days after the closing of the hearings, contending that five or six hundred pages of testimony could not have been reviewed by him with due care within so short a period. The defeated party, however, overlooked the fact that during the eleven sessions and in the interim the arbitrator practically lived with the case day and night, and that for ten hours prior to rendering his decision he checked up every phase of it with the stenographic record.

The court upheld the award of the arbitrator, and the matter was then promptly settled in accordance therewith.

It is interesting to note that immediately after the award was confirmed by the court, the parties in dispute got together and resumed trading.

* * *

[In a letter to the editor, Mr. Charles L. Bernheimer, Chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York states that in the past fifteen years during which he has been chairman there were seven or eight arbitration decisions pronounced at the Chamber which were challenged. In each

instance the Supreme Court, and even the Appellate Division of New York confirmed the findings of the arbitrators. "This record shows that statutory arbitration has teeth in it. At the same time it is subject to the statutory burdens which at times may appear irksome to the layman, but they are little formalities which in the end carry great weight. It is as the result of the careful and expert watchfulness of these little formalities that the Chamber can show the record referred to above. In other words, statutory arbitration, which is enforceable, must be conducted with the greatest care and punctiliousness, preferably under the auspices of an institution of standing, whether it be a board of trade, chamber of commerce, etc. and under the guidance of men who are experts, and men of standing in their community. If these formalities are not complied with there is danger that the entire system of commercial arbitration will fall into disrepute and subject itself to legislation which eventually may be adverse, and even nullify all that the friends of arbitration have fought for since Lord Coke pronounced his famous dictum in *Vynior's case* in 1609."—*Editor.*]

SELLER'S LIABILITY FOR MISROUTING

THE QUESTION

Is Seller liable for misrouting a shipment accepted by Buyer?

THE FACTS

On December 12th, 1922, Buyer ordered one car Idaho White Pine to be shipped "CNW care Pere Marquette—Hold at Ludington, Mich." On December 14th, Seller acknowledged same as "Route Soo to Manitowac for P. M. Delivery to Ludington for diversion," "Prices F. O. B. 87 cents rate." On April 9th, Buyer requested invoice and Bill of Lading so they could divert. On April 16th Seller invoiced CP 116218 with Bill of Lading

⁶ From *Arbitration Decisions of the National-American Wholesale Lumber Association, Inc.*

attached, which was a straight Bill of Lading consigned to themselves (Seller) at Manitowac, Mich. On May 3rd, Seller wired the Soo Line Agent at Minneapolis to forward the car to Buyer at Ludington, P. M. Delivery for diversion as the agent notified the Seller that the car was being held at Manitowac, Wisconsin, for orders, copies of the wires being furnished to Buyer who promptly returned Bill of Lading requesting Seller to endorse same, which was done. Buyer then reconsigned the car to New York. The freight bill shows a local to Ludington and a local to New York with \$6.00 car service at Manitowac and two reconsignment charges of \$6.30, totaling \$639.53.

THE DECISION

The Contract provides that Seller shall make delivery on through rate, 87 cents, allowing Buyer reconsignment privilege at Ludington at Buyer's expense. The Seller breached the contract by shipping the car to Manitowac.

The Buyer exercised due diligence in handling for diversion, whereas the Seller in ordering the car forward from Manitowac to Ludington apparently made application of through rate to final destination impossible and combination of local rates necessary.

Therefore, it is ordered, that the Buyer, absorb one reconsignment charge; namely, \$6.30, and that all other freight, reconsignment and demurrage charges as shown on paid freight bill, totaling \$633.23 be borne by Seller. No interest to be assessed.

No Legal Opinion Rendered.—*Docket No. 396.*

SELLER'S LIABILITY FOR EXPRESS CHARGES ON A DELAYED SHIPMENT

THE QUESTION

Is buyer entitled to difference between freight and express charges on one of three shipments on an order calling for shipment at two week intervals, where first car was delayed?

THE FACTS

Buyer and Seller entered into an agreement calling for a shipment of five cars of veneer shooks to be shipped as follows. First car to be shipped the first week in September, second car end of the third week in September, third car end of the first week in October, fourth car end of the third week in October, 1922. Acknowledgement of the seller carried the printed clause, "All orders accepted subject to delays occasioned by strikes, fires or other causes beyond our control." After promising definite date of shipment several times which was not fulfilled, seller finally made shipment of first car on October 6, 1922. On October 2 buyer notified seller that as its customer could not wait longer for the first car it was compelled to repurchase same for express shipment and that its customer expected to hold them for the charges. Buyer stated further that they felt Seller should stand such loss. The customer then charged the buyer with \$541.56 extra expense, half of which buyer charged to the seller, which is now in dispute.

THE DECISION

We hold that Seller's letter of September 18, promising shipment on September 20, supercedes the shipping date shown on the acknowledgement, and that had shipment been made in accordance therewith no claim would have been made. In view of this and other letters promising shipment buyer was justified in withholding replacement of the order until it became necessary to ship by express. Therefore we find that Buyer is entitled to the sum of \$270.78 from Seller.—*Docket No. 359.*

LIABILITY OF SHIPPER FOR COMMISSION AGENT'S
FEES WHERE CAR IS REFUSED

Whether Commission Agent is entitled to commission on an order taken from Buyer and placed with Seller.

THE FACTS

On October 18th, 1922, Seller sent Commission Agent its circular in which code "Agato" calling for a car of 7-16x6" Clear "A" Red Cedar Bevel Siding. On November 1, Commission Agent wired Seller ordering this car to be shipped to a certain Buyer to which Seller wired that car was sold but offered in place a car containing six parcels various lengths of siding at different prices, and 50M Extra Clear Shingles, offering to divide the "overage" on basis of one-half each.

On November 2, Commission Agent wired Seller that Buyer would not accept the short lengths, but would take the first item of 38M ft.

On November 2, Seller wrote Commission Agent making a counter offer which contained this item of 38M ft. and smaller amounts of short lengths, the balance of car to be Extra Clear R. C. Shingles.

On November 9, Commission Agent wired Seller acceptance of this offer with the proviso that fair percentage of 10 ft. and longer be included. Confirmations were then exchanged between Buyer and Seller on this basis except that Seller's confirmation made no mention of a fair proportion of 10 ft. and longer.

On November 21, Seller made shipment which was rejected on December 2, by the Buyer, who claimed that the contents were not in accordance with specifications.

THE DECISION

The shipment made did not conform with the contract and Buyer was within his rights in rejecting the car.

The Commission man having performed his duties in bringing Buyer and Seller together is entitled to his commission, regardless of whether Seller completed its performance or not. It is therefore,

HELD: That Commission man is entitled to the sum of \$60.90 from Seller.—*Docket No. 350.*

A SUMMARY OF PRACTICES OF CHAMBERS OF COMMERCE BEARING ON ARBITRATION ¹

(An analysis of 117 replies to a questionnaire addressed to approximately 800 Chambers of Commerce. The Chambers of Commerce which do not appear in this tabulation did not reply.)

Key to Figures:

1. Active arbitration organization
2. Arbitrate, but through other agencies
3. Arbitration organization under consideration
4. Informal conciliation when possible
5. Occasions for arbitration do not justify an organization
6. Do not undertake the settlement of disputes

Alabama:

Birmingham	6
Montgomery	4

Arizona:

Tucson	2
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Arkansas:

Fort Smith	4
------------------	---

California:

Bakersfield (f)	4
Compton	4
Pasadena	6
San Francisco	1
Stockton	3

Colorado:

Denver	4
Pueblo (e)	1
Trinidad	4

Connecticut:

Greenwich	1
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Florida:

Miami	3
Orlando	6

Georgia:

Augusta (b)	1
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Illinois:

Cairo (a)	3
Chicago (a)	1
Danville	1
Granite City (c)	3
Kankakee	6
Peoria (a)	1
Springfield	2
Urbana (a)	6
Waukegan	6

Indiana:

Bloomington	4
Gary	4
Indianapolis	6
*Indianapolis	3
South Bend	6
Terre Haute	2

Iowa:

Fort Madison	6
--------------------	---

Kansas:

Emporia	4
---------------	---

Kentucky:

Danville	6
----------------	---

Louisiana:

Baton Rouge	3
Hammond	6

¹ From report of Committee on Trade Relations, National Distribution Conference, Washington, D.C. Chamber of Commerce of United States. 1926.

(a) (b) (c) (d) (e) (f)—See p. 75. * State Chamber of Commerce.

See Key to figures page 73.

New Orleans (d)	I
New Orleans (a)	I

Maryland:

Baltimore (a)	4
---------------------	---

Massachusetts:

Athol (d)	4
Boston	I
*Boston	I
Fall River	5
Lowell	3
New Bedford (b)	3
North Adams	6
Springfield	6
Worcester	6

Michigan:

Detroit (b)	2
Grand Rapids (a)	I
South Haven	6

Minnesota:

Duluth (d)	I
Minneapolis	I
Owatonna	4
Stillwater (a)	5

Mississippi:

Greenwood	3
-----------------	---

Missouri:

Kansas City	3
Kansas City (d)	I

Montana:

Great Falls (c)	6
Helena (c)	2

Nebraska:

Lincoln	5
---------------	---

New Hampshire:

Concord	4
Portsmouth	6

New Jersey:

Atlantic City	I
East Orange	6
Jersey City	6
Newark	I

(a) (b) (c) (d) (e) (f)—*See p. 75.*

Paterson	I
Trenton	4

New York:

Albany	5
Auburn	3
Borough of the Queens New York	I
Buffalo	5
Glens Falls	3
Ilion	6
Jamestown	6
New York (e)	2
Plattsburg	6
Rochester	I
Schenectady	I
Watertown	I

Ohio:

Cincinnati	I
Cleveland	I
Dayton	6
Delaware	4
Hamilton	6
Lebanon	6
Portsmouth	5

Oklahoma:

Tulsa	I
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Oregon:

Dallas (c)	5
Oregon City	2
Portland	I

Pennsylvania:

Bradford (b)	6
Conshohocken	4
Harrisburg	3
Meadville	6
Philadelphia	I
Reading	3
Scranton	4

Rhode Island:

Providence	3
Woonsocket	5

South Dakota:

Huron	I
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* *State Chamber of Commerce.*

See Key to figures page 73.

<i>Tennessee:</i>	<i>Utah:</i>
Chattanooga6	Salt Lake City4
Memphis1	<i>Virginia:</i>
<i>Texas:</i>	Fredericksburg5
Corpus Christi6	<i>Washington</i>
Dallas6	Spokane6
Galveston4	<i>West Virginia:</i>
Houston1	Weston5
Orange5	<i>Wisconsin:</i>
San Antonio3	Madison (a)6
Waco6	
Wichita Falls6	

TOTALS

1 = 30; 2 = 7; 3 = 16; 4 = 19; 5 = 11; 6 = 34.

(a) Association of Commerce	(d) Board of Trade
(b) Board of Commerce	(e) Merchants Association
(c) Commercial Club	(f) Civic Commerce Club

ESTABLISHMENT OF ARBITRAL FACILITIES BY LOCAL COMMERCIAL ORGANIZATIONS*

The following suggestions for the establishment of arbitral facilities by local commercial organizations are derived from the practical experience of bodies affiliated with the American Arbitration Association:

I. RESOLUTION OF ENDORSEMENT

The organization should formally adopt a resolution endorsing the principle of arbitration as the constitutional basis for action and authorizing the establishment of arbitral facilities.

II. COMMITTEE ON ARBITRATION

The President should then appoint a Committee on Arbitration of not less than three nor more than nine members. These members should represent the varied

* From *American Arbitration Association. Bulletin. June, 1926.*

interests most closely identified with the business life of the community and should command its confidence.

The Committee shall, in general, promote the use of arbitration, make rules and regulations for the conduct of arbitrations including the fixing of fees, and establish a panel of arbitrators. The Committee shall have prepared, under its direction, the necessary forms and papers and shall provide adequate rooms for hearings and the required clerical service. In its discretion, the Committee may reject any matters submitted for arbitration under its auspices.

The Committee shall select a secretary who may be the secretary of the local organization, or any other person agreed upon, who shall act as the clerk of the arbitration tribunal. Whenever possible, a member of the Committee shall attend the hearings.

III. DUTIES OF THE SECRETARY

The secretary shall perform such duties as the Committee assigns to him and, as clerk of the tribunal, shall conduct all negotiations, prepare the necessary written submission and other forms required for arbitration, receive and file all submissions and copies of awards, give notice of all hearings, keep minutes of the hearings and a record of all cases, render all necessary assistance to arbitrators, receive all fees and deposits and disburse all funds and pay all costs and keep an account thereof, and perform all of the duties incumbent upon such secretary. It may be advisable, also, for such secretary to be commissioned as a notary public so that he may administer such oaths as may be required under the statute or rules of procedure.

IV. PANEL OF ARBITRATORS

The Committee shall select a panel of arbitrators consisting of experts in the local trade and business activities and such members of the community as command its

respect and confidence and are competent to act as impartial judges. The list shall be fairly representative of the various interests in the community. Arbitrators, when notified regarding their appointments, shall be advised that the position is honorary and that ordinarily fees are not to be expected, except and unless the parties to a specific controversy agree voluntarily to such an arrangement. When appointment is accepted, each arbitrator shall be furnished with a certificate of appointment as an "Official Arbitrator of the (name of organization)" and shall be kept advised from time to time concerning arbitral matters.

In addition to the standing panel, parties shall be free to select arbitrators from other sources who, upon their nomination following agreement between the parties, shall be notified by the Committee or secretary of their selection. This privilege shall not, however, be held to include the appointment as arbitrators of *advocates* for either party, for such appointment defeats the impartial character of arbitral proceedings.

V. RULES OF PROCEDURE

The Committee should adopt rules of procedure, the following being suggested as practical and feasible:

1. *Questions to be Arbitrated*: Any controversy which is subject to a civil action in court may be arbitrated.
2. *Definitions*: Under these rules the word "Submission" refers to the act of submitting the controversy in writing to the judgment of arbitrators; the words "Party" or "Parties" refer to the parties to the submission; the words "Arbitrator" or "Arbitrators" refer to the person or persons selected to arbitrate the dispute; the word "Award" refers to the decision of the arbitrators as to how the controversy shall be settled or adjusted; the word "Committee" refers to the Committee on Arbitration of the (name of organization); the word "Secretary" refers to the Sec-

retary of Arbitration who shall act as the clerk of the tribunal.

3. *Voluntary Submission to Arbitration*: When either party to an existing controversy desires to submit the matter in dispute to arbitration under the rules of procedure of the Committee on Arbitration of the (name of organization), such party should secure the consent of the other party to the controversy.
4. *Arbitration Under Clause in Contract*: If a dispute arises out of a contract which contains an arbitration clause, enforceable under the United States Arbitration Act, or under the arbitration laws of the States of New York, New Jersey, Oregon and Massachusetts, and in conformity with the rules of procedure of the Committee on Arbitration of the (name of organization), either party may make formal demand upon the other party to the contract to proceed with the arbitration in accordance with the terms of the contract. If a party fails, neglects, or refuses to perform under the contract, the appropriate court will, upon motion, order the arbitration to proceed in conformity with such rules of procedure.
5. *Appointment of Arbitrators*: Arbitrators may be appointed from the official panel submitted by the Committee, or may be designated by the parties, by any one of the following methods:
 - (a) The designation by both parties of one or three arbitrators, mutually agreed upon;
 - (b) The selection of one arbitrator by each party and the two so selected to designate a third;
 - (c) The selection of one arbitrator by each party and the third to be appointed by the chairman of the Committee; or
 - (d) The designation of one or three arbitrators by the chairman of the Committee.

If no method of selecting the arbitrators is designated or agreed upon by the parties, within thirty days after signing the submission, the Committee shall name the method to be followed.

6. *Arbitration by Correspondence*: When it is not desired that a hearing be held or that the parties and witnesses appear before the arbitrators, the parties to the controversy may agree to arbitrate by submitting a written statement of the issues involved to the arbitrators, for their decision in accordance with these rules. Each party shall then transmit with the submission to arbitrate, a clear, concise statement of the claim or of the defense, all written documents, verified statements from books of account or other evidence and, if the transaction was based on an oral agreement, a verified statement of all the facts, as well as any other data, information, samples (where questions of quality, size, etc., are involved) which in any way relate to the subject matter of the dispute. The arbitrators may, in their discretion, transmit to each party the statement of claim or evidence of the other party and may request further evidence from either of them.
7. *Secretary to be Notified*: When the parties to a controversy are ready to arbitrate they shall notify the secretary that they have so agreed, specifying by which method the arbitrators shall be selected, and stating whether a hearing shall be held or the matter shall be submitted by correspondence.
8. *Arrangements for Arbitration*: The secretary will proceed promptly to secure the arbitrators in the manner indicated, and will prepare all necessary documents, as hereinafter provided for, and arrange with all parties concerned for the time and place of the arbitration.
9. *Written Submission Required*: Both parties shall sign a submission, in which the issue is clearly

- stated, to be in triplicate and to be duly acknowledged before a Notary Public or other official duly authorized by law to administer oaths.
10. *Submission to be Filed*: One of the submissions signed and acknowledged by both parties to the controversy shall be filed with the secretary, and one shall be retained by each of the parties.
 11. *Authority to Sign Submission May be Required*: Where a submission is not signed by the principal, the secretary may require such proof of the authority of the person signing on behalf of the principal as he shall deem necessary or proper, e.g.:
 - (a) If signed by an agent, the original or a duly authenticated copy of his power of attorney;
 - (b) If signed by one or more partners, the written consent of co-partners not signing the submission;
 - (c) If signed on behalf of a corporation, a duly certified copy of the resolution authorizing the officer to act on behalf of the corporation in such matters.
 12. *Apportionment and Prepayment of Expenses*: Unless otherwise agreed upon by the parties, all costs of the arbitration, including the expenses (if any) of the arbitrators, shall be borne equally by the parties, and each party shall forward his share of the total estimated expense to the secretary at the time of filing the submission, the secretary to estimate the amount as hereinafter provided.
 13. *Personal Expenses of Parties*: Each party shall pay his own personal expenses, those of witnesses introduced by him in his behalf, and those of his counsel, if any.
 14. *Arbitrators' Expenses*: The arbitrators shall be entitled to all legitimate expenses connected with their services and attendance at the hearings.

15. *Arbitrators' Fees*: The expenses of the arbitrators shall not include fees for personal services, unless the payment of such fees is agreed upon between the arbitrators and the parties at the time of filing the submission.
16. *Arbitrators' Qualifications*: No one may act as arbitrator who has any financial or business interest in common with either party.
17. *Arbitrators' Conduct*: The arbitrators shall not confer with either party regarding the issues involved, prior to the filing of the award, except at the formal hearings.
18. *Arbitrators—Selection of Chairman*: If three arbitrators are chosen, the chairman shall be elected by the arbitrators or appointed by the Committee.
19. *Arbitrators to be Sworn*: The arbitrators, before the hearing begins, must take an oath faithfully and fairly to hear and examine the matters in controversy and to make an award which will be just and according to their understanding and interpretation of the evidence, *unless the parties expressly waive this requirement in writing*.
20. *Prompt Hearing*: The hearings shall commence as soon as practicable after the filing of the submission and shall be pressed to speedy termination.
21. *Proceedings Private and Confidential*: No one except the arbitrators and the secretary shall be present at hearings held in connection with the arbitration of any controversy, without the consent of both parties to the arbitration. The details of the arbitration proceeding and all documents and other data submitted as evidence shall be held in strict confidence by all parties to the arbitration and shall not in any manner be made public *without the consent of both parties*.
22. *Stenographic Record Waived*: A stenographic record of the testimony and proceedings will not be made and is waived, by acceptance of arbitration

under these rules, unless it is expressly demanded and required by either party at the time of filing the submission.

23. *Introduction of Evidence*: Each party may submit at the hearing such evidence as he may deem essential, through his own and his witnesses' testimony and with or without the assistance of counsel, without being required to adhere to rules of evidence or other procedural technicalities.
24. *Unrelated Matters to be Excluded*: The arbitrators shall receive all evidence bearing upon the issue but may exclude matters obviously unrelated which are time-consuming and tend to becloud the issue; they will not be bound by the strict legal rules of evidence.
25. *Witnesses May be Sworn*: The arbitrators may require all persons testifying to be sworn but, in their discretion, the oath may be waived by mutual consent, *in which case such waiver should be recorded in the minutes of the hearing.*
26. *Conciliation of Parties*: The spirit of conciliation should guide the arbitrators in their conduct of the proceedings and they should endeavor to remove all doubts and misunderstandings between the parties so as to effect, if possible, a meeting of their minds.
27. *Majority Vote Required*: Where there is more than one arbitrator, the vote of the majority shall constitute a decision or award, and shall be binding upon the parties.
28. *Form of Award*: When an award is made the arbitrators may, whenever they deem it expedient for the purpose of promoting a better understanding between the parties or for other reasons, express their reasons for the award. The award in form should be definite, certain, complete and unambiguous, and shall be executed in triplicate.

29. *Parties to Receive Copy of Award*: Each party to the arbitration shall be entitled to a copy of the award.
30. *Time Allowed for Making Award*: The arbitrators shall make their award within thirty days after final hearing, unless an extension of time is agreed upon, *in writing*, by the parties.
31. *Filing and Correction of Award*: The award of the arbitrators, under the United States Arbitration Act and under the arbitration law of (name of state) may be filed in the office of the clerk of the appropriate court and upon motion of either party, the court must confirm the award and enter judgment accordingly, unless fraud, partiality or other misconduct by the arbitrators, as defined in the statutes, is proved. Where there is evident miscalculation of figures, mistake of person or any imperfection of form, the court may correct the award accordingly.
32. *Where No Award is Made*: If no award is made within the time specified, the arbitrators shall be automatically discharged and their positions deemed vacant.
33. *Declaration of Vacancy*: The Committee shall have power and authority to declare the position of any arbitrator vacant by reason of sickness, death, resignation, absence, disqualification, neglect, refusal, or inability to act and any such declaration of vacancy by the Committee shall be final, conclusive, and binding upon all the parties.
34. *Filling Vacancy*: Vacancies shall be filled in the manner provided for by these rules for original appointments.
35. *Resumption of Proceedings*: Upon appointment of any new arbitrator he and the remaining arbitrators shall meet and agree as to the manner of conducting and proceeding with the arbitration in view of the substitution of arbitrator; but if the arbitrators fail,

neglect, or refuse to agree within such time as the Committee may deem reasonable, then the Committee shall make a rule or order in accordance with which the arbitrators shall proceed, and such rule or order shall be final, conclusive and binding on all the parties.

36. *Construction of Rules by Arbitrators:* The arbitrators shall construe these rules and regard the submission to them as being designed to secure justice and equity in the shortest possible time, with a minimum of expense, and above all, if possible, to obviate or, in any event, minimize the annoyance, irritation, and bad feeling which often exists or is engendered between disputants.
37. *Arbitration Committee to Decide Rules and Procedure:* In case of difference as to the procedure or any matter not expressly covered by these rules, or in the event of any misunderstanding or question concerning their interpretation or application, the determination of the Committee, not contrary to express provisions of law, shall be binding and conclusive upon the parties.
38. *Amendments to Rules:* The Committee shall have full power to amend, alter, repeal, add to, or omit any of these rules, from time to time, as may be found expedient.

VII. INFORMATION CONCERNING ARBITRAL FACILITIES

When the Committee is ready to accept requests for arbitration, it should first publish the panel of arbitrators and then send a notification to each person, firm or corporation engaged in business in the community or, if that is not possible, to its membership advising them of the facilities. The Committee should also undertake the duty of educating the business men of the community as to the savings in time and money and in the retention of business friendships which arbitration effects. It is not

sufficient merely to establish arbitral facilities; their values must constantly be demonstrated. Publicity is desirable when it develops from the actual work of the tribunal, but propaganda should be distinguished from information concerning the facilities and the results accomplished.

HOW TO ARBITRATE *

I

When a dispute which is subject to litigation arises in a business transaction, and there is no *previous* agreement to arbitrate, the parties (individuals, firms or corporations) may *voluntarily* submit it to arbitration. Based on the practice established under the New York State Arbitration Law, and applicable generally under the United States Arbitration Act, the technical procedure to be followed, if the entire proceeding is to be valid, irrevocable and enforceable, is as follows:

First: Both parties must sign a "submission" in which the issue is clearly stated and which must be duly acknowledged before a Notary Public.

Second: The arbitrator or arbitrators are selected by the parties or, at their request, may be appointed by any organization designated by them or, upon proper application, by a court having competent jurisdiction.

Third: The time and place of the hearing are then set, with due regard to the convenience of the disputants and the arbitrator.

Fourth: The arbitrator, before the hearing begins, must sign an oath to hear and examine faithfully and fairly the matters in controversy and to make an award that will be just, according to his understanding and interpretation of the evidence, unless the parties expressly waive this requirement in writing.

Fifth: Each disputant submits at the hearing such evidence as he may deem essential, through his own and his witnesses' testimony and with or without the assistance of counsel, without

* From *American Arbitration Association. Bulletin.* March, 1926.

being required to adhere to rules of evidence or other procedural technicalities. The arbitrator may require all persons testifying to be sworn but, in his direction, the oath may be waived by mutual consent—in which case such waiver should be recorded in the minutes of the hearing. He may also subpoena witnesses and books and papers.

Sixth: The award of the arbitrator may be filed with the clerk of the appropriate court and, upon motion of either party, the court must confirm the award and enter judgment accordingly—unless proof of fraud, partiality or other misconduct by the arbitrator, as defined in the statutes, is proven. Where there is evident miscalculation of figures, mistake of person or any imperfection of form, the court may correct the award accordingly.

II

If a dispute arises out of a contract which contains an arbitration clause (see proposed standard clause below), the party aggrieved should make formal demand upon the adverse party to proceed with the arbitration in the manner prescribed by the statutes, and in accordance with the terms of the contract and in conformity with the rules of procedure of any organization specified therein. Thereafter, the procedure is similar to that followed where an existing dispute is voluntarily submitted to arbitration, as outlined above. Where a party fails, neglects or refuses to perform under the contract, the appropriate court will, upon motion, appoint the arbitrator and order the arbitration to proceed.

STANDARD ARBITRATION CLAUSE

An individual, firm or corporation may assure itself against litigation by providing for arbitration through the insertion of an appropriate clause in contracts, purchase slips, sales orders, letters and other forms of agreement.¹⁰ Such a written provision to settle by arbitration

¹⁰ It is desirable to consult a lawyer as to the advisability of inserting such standard or other arbitration clause in particular contracts or other forms of agreement, such as purchase slips, sales orders, letters, etc.

a controversy thereafter arising out of the contract, is valid, enforceable and irrevocable under the arbitration law of the United States (in maritime transactions and in interstate or foreign commerce when the amount involved is \$3,000 or over) and under the arbitration laws of only the States of New York, New Jersey, Oregon and Massachusetts.

The text of the following proposed standard arbitration clause, enforceable both under the Federal and the State laws mentioned above, is adapted from the clause heretofore found effective under the New York State Arbitration Law in contracts entered into between residents of that State:

Any and all controversies arising under or out of or in connection with or relating to, or for the breach of, the agreement of which this is a part shall be submitted to arbitration, and judgment upon any award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction in the premises.

In the event that it is desired to safeguard the procedure by utilizing the special facilities of an existing responsible arbitral tribunal, the organization under whose rules, guidance and auspices the arbitration is to take place may be designated by adding the following phraseology to the end of the above clause:

and in accordance with the rules, then obtaining, of the American Arbitration Association (or substitute the name of any other responsible organization).

SOME ERRORS CONCERNING ARBITRATION ¹¹

Certain erroneous beliefs concerning arbitration have been brought to the attention of this Association. These errors are not only hurting the sound practice of arbitration, but they are arousing unmerited prejudice and opposition to the extension of arbitration in the settlement

¹¹ From *American Arbitration Association. Bulletin.* April, 1926.

of economic disputes. Certain of these errors are rectified by stating the correct principle:

WHAT IS ARBITRATION?

Arbitration is the determination, by one or more impartial persons who are chosen by the parties, of a matter in controversy which is submitted voluntarily by the parties to a dispute. Arbitration is to be distinguished from mediation wherein a neutral uses his good offices to bring the parties together. Arbitration is to be distinguished from conciliation wherein the parties, through the intervention of third persons, effect a compromise. The essence of arbitration is not compromise, but the rendering of a just award in accordance with ethical trade practices.

WHO MAY ARBITRATE?

Only competent persons may arbitrate; that is, only persons competent to enter into a contract and capable of its execution may become parties to an arbitration. For this reason, it is requisite that they shall be of age and shall have full power over the subject committed for arbitration, for an award possesses only the validity which it derives from the joint mandate of the parties to the contract.

WHAT IS ARBITRABLE?

A controversy must be arbitrable; that is, it must be a matter wherein the principles of arbitration can be applied effectively. In general, these matters include those in which two parties have a right or interest and over which they possess the requisite power of disposal, and which may be the subject of an action. Exceptions to this rule include the following: matters involving public interests; such as crimes and domestic relations; matters which have been consummated in accordance with specific laws, such as naturalized citizenship; and matters

specifically exempt by statute, such as titles to real property. Claims, therefore, that all disputes may be resolved by arbitration do not take into consideration the many fields where it may not or should not be tried. Used in the proper sense, arbitration is not in competition with the courts, but relieves the court of controversies which have no proper place there.

WHEN MAY ARBITRATION TAKE PLACE?

Arbitration cannot take place without the willingness to arbitrate by both or all parties to the dispute. This willingness is *voluntary*. There is no such thing as compulsory arbitration, for the moment arbitration can be compelled without the previous voluntary assent of the parties, the act ceases to be arbitration. This erroneous belief that arbitration can be compulsory arises chiefly from the fact that the *voluntary* act is sometimes recorded in a clause in a contract or is embodied in the rules of an organization wherein parties or members agree to arbitrate future disputes of an unknown nature. In the case of a clause to arbitrate under certain laws, the state may compel the performance of the contract to arbitrate; and in the case of a trade organization rule that body may require its observance on penalty of expulsion. But arbitration is based always upon the willingness to arbitrate and the voluntary incorporation of that willingness into a written agreement. Such agreement may relate to future disputes or to an immediate dispute; but no law can compel arbitration without previous voluntary assent thereto.

HOW ARBITRATION TAKES PLACE

Arbitration is effected by a submission: that is, a special agreement concerning the particular question at issue. This submission is usually entered into in addition to the general agreement to arbitrate. The sub-

mission defines precisely the question involved; no room is left for doubt or construction. It also specifies the conditions under which the arbitration is to be conducted and designates the rules to be used. This submission differentiates arbitration from mediation or conciliation and gives to arbitration form and substance and character.

WHO MAY BE ARBITRATORS?

Arbitrators are impartial and qualified persons: that is, they must be known to be impartial (thus having no interest in the case); they must be competent (thus being familiar with the customs of the trade involved in the disputes); and they must be of good standing in the community. The practice of selecting partisans of each party and a neutral umpire has given rise to much of the prevalent criticism concerning the partiality of awards. To the degree in which responsible arbitration committees and standing panels of arbitrators supplant this practice, confidence will increase in arbitration. It is erroneous to assume, however, that the occasional practice of choosing partisans is the rule, for such is not the case and for every such partisan selection there are many others which do not countenance the practice but insist upon impartial, competent and responsible persons. While trade experts predominate, lawyers and jurists are frequently preferred as being in the habit of weighing evidence and sifting facts, and as being of special service in disputes in which questions of legal interpretation may arise.

UNDER WHAT RULES DO ARBITRATIONS TAKE PLACE?

Arbitrations take place under whatever rules the parties agree upon. The right reserved to the parties to make or modify rules has given rise to the inference that arbitrations are conducted in an informal, irresponsible, if not haphazard, way. Such is not the case, for trade organizations which dispose of any considerable number

of cases or which have tribunals of their own have either adopted a carefully prepared procedure or follow the rules formulated by other organizations. These rules are scrupulously followed, as the award may be voided for an infraction of such rules. It is the exception rather than the regular practice that parties make modifications in rules when they submit disputes for settlement.

UNDER WHAT LAW ARE AWARDS MADE?

Recourse to arbitration implies an engagement to submit in good faith to an award. Arbitrators in rendering an award are not bound to follow law or to take into consideration court decisions or to know legal precedents. This freedom has given rise to the criticism that arbitrators are free to follow their own inclination in high disregard of law. There are, however, certain fundamental principles which govern the taking of an award, of which the following may be mentioned: (1) The award must be according to the submission: arbitrators cannot exceed the powers conferred upon them by the parties. (2) The award must be according to the trade practice or custom, where the arbitration is conducted under the rules of an organization which has formally adopted such a practice or custom, and it is the duty of the arbitrators to ascertain it; if there is no formulated practice, arbitrators should make every effort to ascertain the trend of practice. (3) The award must be based upon ascertainable facts and for this purpose documents and papers and books may be requested and witnesses heard, and counsel for the parties may be present. (4) The award rendered must be certain in its terms and final in its form, permitting of no ambiguity. (5) The award must be possible and lawful in its performance, otherwise it would be against the public interest.

But what is vastly important is the practice of judicial reference. Questions of law as well as of fact may confront the arbitrators. In such cases the practice of re-

ferring these questions to a court for an opinion is increasing and arbitrators show less and less inclination either to ignore these legal questions or to resolve them in layman fashion. On the contrary, the sound practice of arbitration requires that whenever legal questions arise in the course of an arbitration judicial reference is the proper procedure, and certain arbitration statutes, such as those of Illinois and Massachusetts, specifically provide that such questions shall be referred to a court for opinion upon the request of either party.

Under certain statutory regulations the confirmation of an award is further safeguarded. A judge must vacate an award upon the application of any party to the arbitration, when it was procured by corruption, fraud or undue means, when there was evident partiality or corruption in any of the arbitrators or when they were guilty of misconduct or other misbehavior or exceeded or imperfectly executed their powers. An award must be modified or corrected by a court when there was an evident miscalculation of figures or mistake in the description of a person or property, when the award is upon a matter not submitted to the arbitrators or is imperfect in a matter of form not affecting the merits of the controversy.

UNDER WHAT CIRCUMSTANCES IS ARBITRATION EFFECTIVE?

As a general rule, arbitration is most effective where the maintenance of good will is essential to preserve good business relations and where commercial peace is involved. It has, therefore, come about that arbitration is applied chiefly: (1) As between members of the same organization, in order to preserve internal harmony. (2) As between producer, wholesaler and retailer in order that the quality of the product may not be impaired by delay in adjusting the dispute. (3) As between parties to a contract, where the publicity and competitive element incident to litigation would impair future contractual

relations. (4) As between parties to a transaction where the delay and expense of litigation, being greater than the value of the commodity affected, would entail waste.

TO WHAT DEGREE MAY ARBITRATION AFFECT LITIGATION?

The objects of the two processes are different. Resort to litigation implies that a party desires to obtain the maximum of his rights according to the technicality of the law and to be vindicated as a matter of public record in his contention. It is a legal proceeding concerned only with a specific complaint.

The object of arbitration is different. Properly stated, its leading elements are as follows: (1) Arbitration is a trade practice; that is, its principle is embodied in a clause, resolution or general rule having for its object the maintenance of commercial peace. As such it aims to prevent strife and animosity and broken relationships when disputes arise. It is as a preventive of ill-will and as a preservative of good-will, and not as a substitute for litigation, that arbitration is fostered by American business. (2) Arbitration is an ethical practice: that is part of the general movement for better business ethics and self regulation which business is undertaking. Obviously to settle disputes amicably is more ethical than to settle them acrimoniously. (3) Arbitration is an economic practice: that is, a labor saving and a time saving device, which has its recognized place in business economy; it is an appreciable item in reducing the cost of production and of distribution. Arbitration is, therefore, an ethical and economic proceeding concerned with business efficiency.

The province of litigation is, therefore, in essence, unaffected by arbitration, for it remains available to the American business man who desires to obtain his rights under the law in a given dispute. And the function of arbitration is unaffected by litigation as a trade practice,

as an ethical practice, and as an economic practice, inherent in American business economy and efficiency. The value of litigation is to be found in vindication of legal rights in specific disputes, while the value of arbitration lies in maintaining good will in trade relations, resulting in savings in time and labor and in a lower cost of production, lower prices and greater output.

TYPICAL RULES OF PROCEDURE

CHAMBER OF COMMERCE OF THE UNITED STATES

I.—ARBITRATION BOARD

The Chamber of Commerce of the United States (hereinafter referred to as the Chamber) shall have an Arbitration Board (hereinafter referred to as the Board,) which shall be composed of the members of the Board of Directors who have been elected to represent the nine election districts into which the country is divided and to represent the activities embraced in the eight departments and who are in the second year of the two-year term for which they are elected: *Provided*, That instead of any member of the Board who cannot act in a case the President of the Chamber may designate any other member of the Board of Directors.

II.—APPOINTMENT OF ARBITRATORS OR ARBITRATOR

At the request of any person who is a member of the Chamber or a member of any constituent organization of the Chamber and who is a party to a business controversy which the parties have agreed to submit to arbitration under the rules of the Chamber, the President of the Chamber shall appoint three of the members of the Board to hear and determine the controversy: *Provided*, That the two parties are not members of the same constituent organization of the Chamber which has provided for arbitration or have not agreed to arbitrate differences under the rules of such an organization; *Provided further*, That if the parties agree to submit their controversy to a sole arbitrator the President shall appoint a member of the Board to act in such capacity. Thereupon, the arbitrators or arbitrator shall have jurisdiction and shall proceed to hearings and award in accordance with the rules provided in Part II of this plan except in so far as the parties may expressly agree upon modifica-

tions, with the approval of the arbitrators or arbitrator. Respecting the propriety of any such modifications, as upon any other question of procedure, the arbitrators or arbitrator may consult the Chamber's Committee on Arbitration.

III.—DISCRETIONARY JURISDICTION

Upon the request of any person not possessing the membership qualifications mentioned in Article II the President may under the same conditions as are stated in Article II appoint arbitrators or a sole arbitrator, whose jurisdiction to hear and to render an award shall attach as provided in Article II.

IV.—HEARINGS

When appointing arbitrators the President shall designate one of the arbitrators as chairman. If the parties so stipulate, for reasons of economy or otherwise, and jurisdiction has attached as provided in Article II or Article III, the hearings shall be held by the chairman, who shall place the results of the hearings before the other arbitrators and all the arbitrators shall participate in rendering the award: *Provided*, That nothing herein shall be construed to require more than two arbitrators to join in an award. If the hearings are not held before the chairman as above provided, they shall be held before the three arbitrators at such time and place as the chairman may set; *Provided*, That nothing herein shall be construed to prevent parties who so stipulate from submitting their controversy upon the documents and written statements and without hearings for oral testimony and oral argument.

V.—BOND

The President of the Chamber shall not announce the names of the arbitrators or arbitrator until each party has filed a bond conditioned upon prompt and full compliance with the award which may be made and payment of all costs of the arbitration that may be assessed against him in the award. The amount of the bond shall be fixed by the President and shall be sufficient, in his judgment, to meet any award that may be rendered in the case and all costs of the arbitration. Every award shall contain a statement of the costs of the arbitration, calculated as indi-

cated below, and shall apportion such costs between the parties, or assign the whole of the costs to either party, as the arbitrators or arbitrator may find is just.

VI.—COSTS OF ARBITRATION

The cost of the arbitration shall consist exclusively of the following items:

Traveling and hotel expenses incurred by the arbitrators or arbitrator;

A fee of fifteen dollars (\$15) per day of not less than three hours for each arbitrator spent in hearings or necessary travel: *Provided*, That if an arbitrator has to proceed three hundred (300) miles or more from his usual place of business to the place of hearings, the fee per day shall be twenty-five dollars (\$25);

Traveling expenses and fees of any expert witnesses called by the arbitrators or arbitrator with the consent of the parties;

The cost of making the necessary number of copies of any document for which a party does not himself provide sufficient copies to allow one for each arbitrator, and a copy for the files of the Chamber;

The cost of any stenographic record requested by the arbitrators for testimony or arguments submitted at hearings.

VII.—FILING OF AWARD

Every award shall be stated in writing and filed with the President of the Chamber, who upon satisfying himself that the award is sufficient in form shall send a copy to each party by registered mail. The parties shall give to the President of the Chamber prompt evidence of compliance with the award. Otherwise, the party who prevailed under the award may make request for recourse to the bond, which recourse may be had as and when the arbitrators or arbitrator rendering the award certify to the President of the Chamber.

VIII.—RECORDS

All papers relating to each case and not properly returnable to the parties shall be deposited with the Chamber and shall in-

clude vouchers for the costs of arbitration, which vouchers shall be audited by the Chamber.

IX.—COMMITTEE ON ARBITRATION

The Chamber shall have a Committee on Arbitration (hereinafter referred to as the committee). The committee shall be composed of the President, the Chairman of the Executive Committee, the Resident Vice President, the Treasurer of the Chamber and three other members appointed by the President.

X.—DUTIES OF COMMITTEE

It shall be the duty of the committee—

- To promote the use of commercial arbitration in accordance with the principles which the Chamber advocates;
- To further the adoption of this plan and to advise organizations and their committees which seek information as to rules, procedure, or other problems;
- To observe the operation of this plan in all of its parts and from time to time to recommend changes which experience may suggest are desirable;
- To assist organizations in the preparation of arrangements which they desire to set up between themselves for arbitration of controversies which arise in the dealing by members of one organization with the members of another;
- To consider the operation of arbitration plans between the Chamber and organizations in Latin-American countries and from time to time to make recommendations with respect thereto;
- To keep informed regarding the operation of arbitration plans used abroad, especially those used in trades in which Americans participate, and to have knowledge so far as possible respecting disposal of cases arbitrated under such plans with Americans as interested parties;
- To submit reports from time to time upon the advantages and progress of commercial arbitration at home and abroad, with recommendations as to activities which the Chamber should undertake;
- To perform such other duties as the Board of Directors may from time to time confer.

XI.—POWERS OF COMMITTEE

The committee shall have the power—

To continue the activities of the Chamber in using its good offices, together with the good offices of organization members when practicable, for the amicable adjustment of business controversies which come to its attention;

To receive from American business concerns or committee complaints regarding transactions with business men of other nationalities and advise and assist toward disposal of such cases through a proper use of good offices or arbitration;

To extend to governmental and other appropriate agencies the good offices of the committee and the opportunities existing under this plan for dealing with business complaints which come to their attention;

To designate the organization under the rules of which a controversy is to be arbitrated when the parties by reason of membership in different organizations have an obligation to arbitrate but have not agreed upon the organization the rules of which are to be used;

To perform in connection with Part III of this plan the functions which under Part II are imposed upon a committee of arbitration, which arise after a case has been submitted to arbitration, and for which provision has not otherwise been made above: *Provided*, That nothing herein shall be construed to permit a protest against an award made under Part III operating to cause suspension of the award, which shall be operative immediately upon being filed with the President and notified to the parties, as provided above;

To receive from any organization, or from its arbitration committee, statements of the case, the award, and the circumstances in the event a party to an award has not complied with the award, and similarly to receive complaints from a party to an award made under Part III of this plan, and to consider what action should be taken: *Provided*, That a party against whom such a complaint has been made shall be given an opportunity to file a statement with the committee;

- To perform in connection with the arbitration plan of the International Chamber of Commerce such duties as may be requested by competent authority;
- To exercise any other powers that may from time to time be assigned by the Board of Directors.

ARBITRATION RULES BOSTON CHAMBER OF COMMERCE¹

Arbitrators

Arbitrators act in a semi-official capacity, are forbidden by law to show partiality to either party, are responsible to the court and to the members of the Chamber of Commerce to carefully and conscientiously study the issues in dispute and to render a definite and just decision.

In answer to a demand for a simple, speedy and convenient method of settling business disputes, the Massachusetts and the Federal Arbitration Acts took effect on May 29, 1925 and January 1, 1926, respectively. Both laws affirm the legality of a clause in a commercial contract providing that any disputes arising under the contract be submitted to arbitration. These laws do not apply to contracts involving labor disputes.

The Boston Chamber of Commerce through the following rules and regulations has established a method of arbitration in order to assist parties who may desire to take advantage of these laws or of the procedure of the International Chamber of Commerce.

ARBITRATION RULES OF THE BOSTON CHAMBER OF COMMERCE

SECTION I

The Committee on Arbitration shall consist of such members as the Board of Directors may designate.

¹ By Committee on Arbitration, 1926.

The Secretary of the Boston Chamber of Commerce, or his authorized deputy, shall be the Secretary of the Committee on Arbitration.

SECTION 2

This Committee shall have jurisdiction over all matters of arbitration referred to the Chamber.

1. Subject to the approval of the Board of Directors, it shall make rules and regulations for the conduct and disposition of all matters submitted for the arbitration of the Chamber including a schedule of fees.
2. It shall compile and from time to time revise, and keep, a suitable list of qualified persons willing to act as arbitrators under these By-Laws. This list shall be known as "The List of Official Arbitrators of the Boston Chamber of Commerce."
3. It shall provide proper forms of submission and documents of award.
4. It may accept or reject any matters submitted to the Chamber for arbitration.

SECTION 3

In case no Arbitrator(s) are named in the agreement, the Chairman of the Committee on Arbitration, or in his absence or inability to serve, the Vice Chairman, after giving due consideration to the wishes of the parties to the controversy shall select two Arbitrators from the list of Official Arbitrators, who in turn shall select one further Arbitrator from the same list. Upon the written request of both parties a sole Arbitrator shall be selected by agreement of the parties. Neither the sole Arbitrator nor a majority of the Arbitrators shall be agents or employees of one of the parties.

SECTION 4

The Committee on Arbitration shall have authority to declare the position of any Arbitrator vacant by reason of sickness, death, resignation, accident, disqualification, misconduct, neglect, refusal, incompetence, delay, or inability to act. Vacancies shall be filled in the manner provided for original appointment.

SECTION 5

The Committee shall instruct Arbitrators on questions of procedure when so requested by them.

RULES AND REGULATIONS OF THE COMMITTEE ON ARBITRATION

Procedure

Upon receiving the application for arbitration the Chairman shall specify the time within which both parties to the controversy shall submit briefs giving in detail their sides of the dispute, accompanied by proper exhibits. If, however, the written briefs as submitted prove to be insufficient to guide the Arbitrator(s) in their final determination or award, then the Arbitrator(s) may call for further evidence, oral or written, and witnesses. If oral testimony is required hearings shall commence as soon as practicable after submission and shall be pressed to speedy termination. An abstract of testimony shall be kept, but a stenographic record need not be made unless expressly demanded and the expense assumed by one or both of the parties.

Arbitrators

Arbitrators should proceed in a spirit of conciliation, excluding irrelevant matters, and attempting to effect a meeting of the parties' minds. It shall be deemed misconduct for an Arbitrator so to conduct himself as to defeat the purpose of the arbitration by acting either for his own convenience or in the supposed interest of one of the parties. (Advisory opinion New York Court of Appeals.)

Witnesses

Each party shall furnish his own witnesses, paying the fees for summoning them according to law. Witnesses may be asked to testify under oath and if they decline their testimony may be refused.

Hearings

The members of the Committee on Arbitration may be present at any of the hearings. Parties to the controversy may be present or represented by a person acceptable to the Arbitrator(s). Other persons may be admitted by the Arbitrator(s).

Awards

A final and definite award in writing shall be made by all the Arbitrators or the majority who joined in it. The award may

specify damages and expenses, make any decision, and grant any remedy with respect to the controversy which shall to the Arbitrator(s) seem just and equitable. The ordinary cost of the proceedings shall be equally divided among the parties unless otherwise decided by the Arbitrator(s).

The award shall be made as soon as possible after the final hearing, in no case to be over one year from the date of submission. It shall be executed in quadruplicate, a copy being delivered to each of the parties, upon application by either party, a copy to the Court under whose jurisdiction the arbitration is being held, and a copy for the Secretary. It shall be attested by the Secretary under the seal of the Chamber.

Deposit

The party or parties applying for arbitration shall at the time of submission deposit with the Treasurer of the Chamber the sum of fifty dollars, which shall be used to defray the expenses of the arbitration hearing. If the deposit appears insufficient to the Secretary of the Committee or becomes exhausted, he shall call upon the parties equally for such further sums as may be required. The Chamber after reimbursing itself for expenses incurred in connection with the arbitration proceedings shall return any amount not used to the depositors.

The Committee

In case of any misunderstanding or any question concerning the interpretation of these rules and regulations the decision of the Committee on Arbitration shall be conclusive. It may whenever it deems it appropriate or necessary adopt special rules applicable to any particular arbitration.

The Secretary

The Secretary of the Committee on Arbitration shall receive and file all submissions, all awards, arrange and give notice of hearings, keep a docket of all cases and such books and memoranda as the Committee shall from time to time direct. He shall render all necessary assistance to the Arbitrators and attend to the clerical work.

RULES OF THE ARBITRATION COMMITTEE OF THE BOSTON REAL ESTATE EXCHANGE

Rule I. The Arbitration Committee shall consist of eleven Resident Members of the Exchange, of whom not exceeding five may be Directors, to be chosen by the President as soon after the annual meeting as possible. The Treasurer of the Exchange shall be, ex-officio, a member of the Committee. The Committee shall hold office until the election of their successors, and have power to fill vacancies in their number. Three members of the Committee shall constitute a quorum for the transaction of business.

Rule II. The members of the Arbitration Committee shall organize as soon as practicable after their election, by the choice of a chairman from their own number. The Treasurer shall act as Clerk of the Committee and Custodian of its records.

Rule III. Before entering upon the duties of their office, the members of the Arbitration Committee shall take or subscribe to the following oath:

"I do swear that I will faithfully and fairly hear and examine the matters in controversy which may come before me during my tenure in office, and make a just award therein, according to the best of my understanding. So help me God."

Rule IV. All persons who may desire the services of the Arbitration Committee shall file with the Treasurer an agreement in writing, signed and attested, to submit their case to the Committee and to be bound by its recommendation. Parties may bring witnesses before the Committee but not counsel.

Rule V. The Chairman shall appoint three or more of the Committee to act upon any case submitted, and the recommendation of the majority of the Committee sitting upon any case shall be final, excepting that any person against whom a recommendation may be rendered shall have the right of appeal to the full Committee. In case of appeal to the full committee seven members shall constitute a quorum. The Committee, or any Sub-Committee thereof, shall have power to adjourn the

hearing of any case from time to time as circumstances may require. In all meetings of the Committee full notes by the stenographers shall be made.

Rule VI. The Committee, or Sub-Committee, shall decide whether a hearing in any case submitted is expedient or within its powers, and shall give written notice through its clerk to applicants for arbitration, of time and place appointed for the hearing of their case.

Rule VII. The proceedings of the Arbitration Committee shall be recorded in a book to be kept for that purpose, in which shall be entered a summary of each controversy submitted for the recommendation of the Committee, the award made thereon and the grounds for such award. Said book shall be the property of the Exchange and subject to the inspection of its members on application to the Treasurer.

Rule VIII. Each member of the Arbitration Committee who shall be present at the hearing of any case shall be entitled to a fee of five dollars per diem of service, to be paid by the party against whom the recommendation shall be rendered, except in such cases as the Committee, at their discretion, shall otherwise order.

Rule IX. Any member of the Exchange who shall refuse to submit to arbitration, as hereinbefore provided, any dispute which may arise between him and another member, or between himself and a non-member willing to submit the matter to the Arbitration Committee, and shall resort to a court of law, except with consent of such Committee, shall be liable to be deprived of his membership by a majority vote of the whole Board of Directors.

GRAIN DEALERS NATIONAL ASSOCIATION ARBITRATION RULES²

ARTICLE I

SECTION 1. The Committees on Arbitration shall consist of three members each. Their decisions shall be final, except as

² Adopted October 3, 1901. Amended October 3, 1923.

In a letter from the association to the editor of this handbook it is stated that "there is no question but that arbitration of trade differences

herein provided, and their jurisdiction shall cover all matters of a national, interstate and interlocal character, pertaining to the grain business, and they shall be tribunals of appeal for the review of the awards of the local Arbitration Committees of affiliated Associations.

They shall consider all cases that may come before them, in conformity with the rules herein prescribed therefor; their awards shall be just and equitable, in order that this method for the adjustment of differences may be acceptable to the trade in general, and thus tend to reduce friction, avoid litigation, prevent misunderstandings, and adjust unsatisfactory conditions.

SECTION 2. An affiliated Association may create an Arbitration Committee and adopt such rules and regulations as may be required to define the duties of said Committee, not in conflict with the rules of government and jurisdiction of the National Committee.

The function of an affiliated Association Arbitration Committee shall be whenever possible, to act as a tribunal of first resort for the submission of differences within its jurisdiction, the awards of which shall be subject to appeal to the National Committee, as hereinafter provided.

ARTICLE II

Committees—How Formed

SECTION 1. The National Committees shall be composed of three members each, who shall be appointed by the President and confirmed by the Board of Directors, and each of the committees shall be selected as follows: One prominent receiver or buyer of grain, located at some central market, one prominent and representative country shipper, and one prominent grain dealer,

between members of an organization strengthens good will and minimizes friction and waste in business relations. . . . Affiliated with the Grain Dealers National Association are nineteen state organizations. Both the direct and affiliated members of the National Association are governed by compulsory arbitration rules. At the present time we have six grain arbitration committees, one feed arbitration committee and one appeals committee. If a litigant is dissatisfied with the decision of the arbitration committee he may appeal his case to the appeals committee. This procedure is followed the same as in the civic courts. Beyond any doubt members of our arbitration and appeals committees are better qualified and more capable of passing opinions on grain and feed controversies than a jury in the civil court. That is the reason why compulsory arbitration among direct and affiliated members of the Grain Dealers National Association has been so successful."

not exclusively identified with either of the above mentioned branches of the grain trade—all to be chosen with a view to preserving a geographical balance, and giving such consideration to business conditions as will, as near as possible, equalize the Committees.

When consistent, the last-named selection should be made Chairman.

All appointments to the Committees shall be made from the direct and affiliated membership of the National.

SECTION 2. Affiliated Committees shall be formed in accordance with the rules of their respective associations.

ARTICLE III

SECTION 1. The National Committees shall have jurisdiction over cases as follows:

- (a) Between direct members of the National.
- (b) Between direct and affiliated members of the National.
- (c) Between direct members of the National and non-members, by consent of the member.
- (d) Between two affiliated Associations.
- (e) Between an affiliated Association and an organized Board of Trade, Exchange, or Chamber of Commerce.
- (f) Between organized Boards of Trade, Exchanges and Chambers of Commerce.
- (g) Between non-members, when a National Committee will consent to act. In such cases, the parties to the arbitration shall pay all the expenses of arbitration.
- (h) When appealed from an award of the Arbitration Committee of an affiliated Association, when said appeal is in conformity with the rules governing appeals.

(As between members of either the Kansas, Oklahoma or Texas Affiliated Associations these rules shall not apply as to appeals, except where both parties are direct members of the Grain Dealers National Association.)

SECTION 2. An affiliated Committee shall have jurisdiction over cases as follows:

- (a) Between members of its Association.
- (b) Between members of its Association and a non-member, by consent of the member.

(c) Between members of its Association and members of the National.

ARTICLE IV

Appeals

SECTION 1. When either party wishes to appeal from the award of an affiliated committee, he shall notify the Secretary of the affiliated Association, of his intention in writing, within five days after receiving notice of the award of said affiliated committee; said appeal to conform to the rules of jurisdiction governing the National Committees.

SECTION 2. The appellant shall deposit with the Secretary of the affiliated Association, the required amount as specified in Article VI., Section 1, hereof; said amount to be forwarded to the National Secretary, together with a transcript of the case.

SECTION 3. A fee of \$5.00 shall be paid by the appellant to the Secretary of the affiliated Association to cover the cost of transcript.

SECTION 4. Failure to comply with the provisions of this Article shall constitute a forfeiture of the right of appeal.

SECTION 5. When the appellant has complied with the above requirements, as in this Article specified, the Secretary of the affiliated Association shall at once notify the appellee of such compliance, and within thirty (30) days thereafter, shall forward a complete transcript of the case to the National Secretary.

SECTION 6. The decisions of a National Committee shall be final, unless excepted to by either party, when the case may be reviewed by a Board of Appeals, and affirmed, amended, reversed and rendered, or remanded for rehearing.

This Appeals Committee shall consist of five members, selected from the Directors, and appointed by the President, and any decision of the Committee must be signed by a majority of the members thereof.

The Appeal Fee shall be thirty-five (\$35) dollars, which shall be assessed by the Appeals Committee, and shall go into the treasury of the Grain Dealers National Association.

In case of all appeals the above fee of thirty-five dollars shall be deposited with the Secretary-Treasurer of the Association by

each appellant and by each appellee before the case can be considered.

The Appeals Committee shall meet at the call of the Chairman, at some point to be designated by him, at which meeting the Committee shall consider and decide such cases as are properly pending before the Committee.

The expense incurred to the meeting of the Appeals Committee shall be borne by the Association.

SECTION 7. Notice of appeal from an award of a National Committee accompanied by a statement in duplicate of the reasons therefor, shall be filed with the Secretary within fifteen (15) days from the date of the said award. The said notice of appeal shall be attached to the appellant's appeal fee (See Section 6 of this article) and his certified check for the amount of the Arbitration Committee's award in dollars and cents, if any, to be held in escrow by the Secretary of the Grain Dealers National Association pending the decision of the appeal board.

Within three days from the date of the receipt of a notice of appeal at his office, the National Secretary shall forward to the appellee, under registered post, a copy of the appellant's statement of reasons and the appellee shall have ten (10) days from the date of receipt of the said statement of reasons in which to file his answer in duplicate. Immediately upon the completion of the transcript, the National Secretary shall submit the complete file of papers to the Board of Appeals. The Board of Appeals shall be governed by the rules of procedure laid down for the National Arbitration Committees in Section 10 of Article 6 of these rules.

ARTICLE V

Complaints shall be filed as follows:

SECTION 1. With the Secretary of the National within twelve (12) months after expiration of contract on which dispute occurs.

(a) When between members of different affiliated Associations, but only at the request of both parties to the case.

(b) When between direct members of the National.

(c) When between a direct or an affiliated member of the National and an organized Board of Trade, Exchange, or Chamber of Commerce.

(d) When between an affiliated Association, as a body, and an organized Board of Trade, Exchange, or Chamber of Commerce.

(e) When between two affiliated Associations as organized bodies.

(f) When between two organized Boards of Trade, Exchanges, or Chambers of Commerce.

(g) When between direct members of the National and members of an affiliated Association, but only at the request of both parties.

(h) When (upon the recommendation of the affiliated committee with the consent of the Secretary of the National) between affiliated members and non-members.

(i) When between non-members.

SECTION 2. With the Secretary of the affiliated Association having jurisdiction:

(a) When between members of different affiliated Associations. The papers to be filed with the Secretary of the Association of which the complainant is a member.

(b) When between members of an affiliated Association.

(c) When between a member of an affiliated Association and a direct member of the National, except as provided in this Article V., Section 1, paragraph (g).

(d) When between a member of an affiliated Association and a non-member. For exceptions see this Article V., Section 1, paragraph (h).

SECTION 3. Any case submitted to a National Committee shall be governed by the rules of jurisdiction. See Article III.

ARTICLE VI

Code Governing the National Committees and Applicants for Arbitration. (See Article VII. for Guide.)

SECTION 1. Before a case can be submitted to a National Committee, both parties shall file with the National Secretary an agreement in writing to abide by the award of the Committee, and release the members of said Committee from all responsibility for any errors in judgment that may occur in any respect whatsoever, and from the damage or loss resulting from their acts. The agreement shall be accompanied by the arbitration deposit fees of both parties of \$25 each. This fee is to apply to

all parties, namely direct members, affiliated members, non-members and affiliated associations or boards of trade.

SECTION 2. All cases coming under the jurisdiction of the National Committees shall be filed, in writing, and in duplicate, with the National Secretary, and shall include all the evidence and a set of pleadings.

SECTION 3. Upon receipt of the first papers of the plaintiff, the National Secretary shall, within five (5) days thereafter, forward to the defendant a copy of all papers filed by the plaintiff.

SECTION 4. The defendant shall have ten days from the date of the receipt of the plaintiff's evidence and pleadings in which to file his answer in duplicate, and to return the papers referred to in Section 3 of this Article. (See Section 7 of this Article). Failure on the part of the defendant to file his answer within ten days, as in this rule above provided, shall accrue as a default to the plaintiff.

SECTION 5. Upon receipt of the answer of the defendant, the National Secretary shall forward a copy of said answer to the plaintiff, who shall have five (5) days after receiving the said copy in which to file a rebuttal. (See Section 7 of this Article.)

When cases are fully prepared and ready to be assigned for hearing, the Secretary shall alternate the assignments to each of the Committees in such manner as will expedite the hearings.

SECTION 6. The time limits specified for the filing of all arbitration and appeal papers may, for good and sufficient reasons, be extended by the National Secretary.

SECTION 7. The awards of the National Committees shall be dated on the day they are received at the office of the National Secretary, and copies of the said awards shall be mailed by the National Secretary to both parties to the arbitration within three (3) days thereafter. The parties to the arbitration shall either file notice of appeal under Art. 4, Section 6 and 7, or comply with the terms of the National Committee's award within ten (10) days from the date of receipt thereof.

SECTION 8. Postal registry and express receipts shall be the means of determining the several periods of time specified in the sections of this Article.

SECTION 9. The arbitration deposit money shall be either refunded to the depositor or converted to the general treasury of the National, as the Committees in their awards may direct.

SECTION 10. The members of the National Committees may elect to determine their awards, or otherwise dispose of the cases submitted to them, by either of the following three methods:

- (a) By passing the papers from one to another by mail.
- (b) By calling a meeting of the members of a Committee.
- (c) A decision of the members of an arbitration committee may be by majority vote.

SECTION 11. A Committee cannot be called together more than once each calendar month, except by the consent of every member of a Committee.

SECTION 12. A Committee cannot act at a meeting thereof, unless all members are present.

SECTION 13. The parties to an arbitration may appear before a Committee or be represented by an attorney, with the understanding that they, said parties, shall pay whatever amounts, in addition to the regular deposits, as provided for in Section 1, of this Article, as shall be necessary to cover the additional expense of a Committee; the amount of said additional expense to be determined and fixed by the Committee. All evidence submitted in person shall be given under oath, when required by a Committee.

Only a member of the National in good standing may appear as an attorney before a Committee.

SECTION 14. When a case is submitted to a Committee on Arbitration, under the preceding section, they, the members of the Committee, shall fix a time and a place for its hearing, if to be considered as per Section 12, paragraph (b) of this Article, and shall give the Secretary fifteen (15) days' notice of the date and the place so fixed, and this time shall be sufficient to permit the Secretary to give the parties to the arbitration ten (10) days' notice of the date and the place of hearing. The parties shall submit all written evidence to the Secretary on or before the date fixed for hearing, and neither party shall postpone the hearing of a case longer than ten (10) days after it has been submitted, unless good cause, satisfactory to the Committee, can be shown therefor. Requests for postponement must be in the hands of

the Chairman of an Arbitration Committee at least two (2) days prior to the date set for hearing.

SECTION 15. The members of the Arbitration Committees shall receive for their services \$3.00 per diem, for the time consumed in the consideration of cases submitted to them, and shall also receive the amount of their actual traveling and hotel expenses.

SECTION 16. All money received by the Secretary for account of arbitration shall be placed with the general funds of the Association, and the expenses of said Arbitration shall be paid out of said general fund, but a separate account of such arbitration receipts and expenditures shall be kept.

SECTION 17. Neglect or refusal to submit the subject matter of a controversy to arbitration, or failure to comply with an award of an Arbitration Committee, shall be deemed uncommercial conduct, and the penalty therefor shall be expulsion.

Resolution Adopted at the Twelfth Annual Meeting

Whereas, It has become necessary for this Association to pass a resolution for the protection of those of its members who observe its rules and laws, as against those who do not; be it

Resolved, That members of this Association who refuse to submit their differences to arbitration, shall, upon complaint, and upon thirty (30) days' notice, stand expelled.

SECTION 18. In the event of the absence or disqualification of regular members of a Committee, the President of the National shall fill the vacancy with any eligible member who will consent to serve, and the acts of a Committee so formed shall be of the same effect as the acts of a regular Committee.

SECTION 19. A bulletin shall be published monthly, or semi-monthly, if necessary, giving the details, as hereinafter provided, of all cases submitted for arbitration, awards made, and any other information relative to the subject of arbitration which may be deemed of interest to the members of the Association. Copies of the Bulletin shall be mailed to all direct members of the National Association; to the Secretaries of all affiliated Associations, and to the Chairmen of all affiliated Arbitration Committees. Said bulletin shall set forth:

(a) The names of the plaintiff and the defendant, and the nature and the amount of all cases submitted.

(b) The awards of the Committees, giving the names of the plaintiff and the defendant, the nature of the case and the amount involved, the award and such other information as may be of interest to the members.

(c) Notice of settlements, giving a record of each case.

(d) Notice of failures to comply with the terms of awards, giving a record of each case.

(e) Notice of refusals to arbitrate, giving a record of each case, and if good and sufficient reasons are given for said refusals, said reasons shall be published.

(f) Notice of failures to answer the correspondence of the Secretary relative to arbitration.

ARTICLE VII

SECTION I. In preparing either side of the case for submission, the party will be expected to furnish:

1. A concise and clear statement of all that is claimed.
2. The contract or contracts, if any, including all written evidence, letters, and telegrams, tending to establish the terms and conditions.

(The contract is the basis of most of the cases in dispute between grain dealers, and special care should be exercised to establish the terms and conditions of it, in the preparation of a case for arbitration.

An offer by one party, by wire or mail, to buy or sell, and the acceptance of the offer by the other party, may constitute the contract. The confirmation of the contract may be essential in determining what the agreement was, and should always be included.

It is all important that the contract, when there is one, should be clearly and definitely established.)

3. Shipping directions, if any.
4. Bills of lading, if any.
5. Inspection certificates from point of shipment, if any.
6. Inspection certificates from point of destination, if any.
7. Freight expense bills, if any dispute regarding freight paid.

8. Confirmation of freight rates, when that question enters into the case.

9. Authority for freight rate, when difference of rate is involved.

10. Proof of market difference when there is any probability of the market difference affecting the rights of the parties to the case, either because of discount for the account of grade, delay in shipment, or non-fulfillment of contract.

(The proof of market difference should be the price bulletin of the markets to which the grain in question was shipped, or intended to be shipped, of those dates on which the price is to be established; but in case it is necessary to establish such difference in a market where no price bulletin is regularly issued, affidavits by disinterested persons should be furnished.)

11. Evidence in duplicate for plaintiff.

12. Evidence in duplicate for defendant.

13. Rebuttal evidence in duplicate.

14. Arrange all evidence in chronological order so that a clear history of the case can be obtained.

15. When the original papers concerning the case cannot be supplied, and copies are substituted, a statement should be made under oath that the original papers have been lost or are beyond the control of the party offering copies as evidence, and that the copies, so offered, are true copies.

16. Securely fasten all papers together to avoid loss.

17. Samples should not be submitted in evidence as the arbitrators will not act as inspectors or compare samples. If the grade of quality of commodities is in dispute inspection certificates or other documentary evidence must be submitted.

ARBITRATION PLAN OF THE FOOD TRADE

NATIONAL UNIFORM PLAN OF ARBITRATION

SUGGESTED RULES FOR THE CONDUCT OF ARBITRATION³

The National Wholesale Grocers Association and the National Food Brokers Association, with the approval of the National Canners Association, announce the following Rules and Regulations for the guidance of those employing the arbitration system:

³Prepared by the chairman of the National Wholesale Grocers' Association, Arbitration Committee and approved by counsel.

1. When the parties cannot satisfactorily settle a controversy, or the contract under which the merchandise was purchased calls for arbitration if necessary, they should arrange to have the case determined under the arbitration plan.

2. They should notify the Chairman of the Arbitration Committee in the City or district where the dispute arises. If such committee has not been appointed, or if, for any reason, the parties desire to hold the arbitration elsewhere, then they should notify the Chairman of the Arbitration Committee of the city or district upon which they shall agree. The chairman of the Arbitration Committee for the city or district shall then appoint from the Committee three arbitrators to hear and decide the case. A member of the Committee interested in a given case shall not be eligible to act as arbitrator. These arbitrators may be two wholesale grocers and one broker, or two brokers and one wholesale grocer, as the Chairman may determine. The Chairman may be one of the three arbitrators. If the Chairman is interested in a given case, the three arbitrators therein shall be appointed by the Committee or such members thereof as are not interested in that case.

3. We have prepared and published herewith a form of "ARBITRATION AGREEMENT." The Chairman shall furnish the parties to the arbitration with a blank agreement, to be completed, signed and executed by them. The agreement, properly executed, must be returned to the Chairman of the Arbitration Committee before the arbitration is held. The Chairman shall arrange with the parties for a convenient time and place for the presentation of the case.

4. Each case must be clearly stated to the arbitrators, either orally or in writing. If the parties agree to state the case in writing, the facts shall be set forth in a plain and concise statement and the assent of all parties thereto shall be noted thereon in writing. It shall then be referred to the arbitrators for decision without further argument, unless all parties shall agree otherwise. If the case is to be presented orally, each principal shall make his statement in such a manner as the arbitrators may direct.

5. If the nature of the case is such that it is necessary, or the arbitrators desire, that samples of the merchandise in question shall be exhibited to them, such samples must be submitted

by one or all of the principles, at such time and place as the arbitrators require, and every facility must be afforded for their examinations. These samples must fairly represent the average quality and condition of the merchandise and shall be in such quantities as the arbitrators direct. The arbitrators themselves, if they so desire, shall be permitted to take samples directly from the merchandise. If additional samples are required, they shall be furnished in the same manner, as to whatever extent the arbitrators may direct.

6. Upon the request of the arbitrators, the parties must furnish all contracts, letters or other data bearing on the case that the arbitration may consider necessary to a proper determination of the controversy. All such documents and data must be returned to the respective parties by the Chairman of the Arbitration Committee.

7. The concurrence of two of the three arbitrators shall be necessary to a decision and such decision shall be binding upon the parties, but it is most desirable in all cases that the decision shall be unanimous.

8. The arbitrators shall render their decision in writing and shall state as briefly as possible the case, the decision and the reasons therefor. The decision shall be signed by at least two of the arbitrators, and by all if the decision be unanimous. At least five copies of this statement shall be made. It shall be the duty of the Chairman of the Arbitration Committee to see that each of the parties and also the Secretary of the National Wholesale Grocers Association, at No. 6 Harrison Street, New York City, the Secretary of the National Canners Association, Washington, D.C., and the Secretary of the National Food Brokers Association, 326 West Madison Street, Chicago, Ill., receives a copy of the written decision.

9. All proceedings and decisions of the arbitrators in these cases are to be held strictly confidential as regards the parties and all information as to the facts, unless the parties interested shall otherwise consent.

10. Reports of the arbitration work will be issued from time to time by the Secretary, but unless the parties shall otherwise agree, no such report shall furnish the names of the parties or any information regarding the case that should be held in confidence.

11. If no two of the arbitrators are able to agree upon a decision, a second arbitration may be held, if the parties so desire. The same plan shall be followed as in the first arbitration, except that the Chairman shall not appoint the same arbitrators a second time without the consent of all the parties.

12. The arbitration fee shall be Five Dollars (\$5.00) for each arbitrator. Upon the rendition of the decision, the Chairman of the Arbitration Committee shall collect from the loser and pay over to each arbitrator acting in a particular case the sum of Five Dollars (\$5.00) together with his necessary expenses. In case of the failure of the arbitrators to decide the case, no fee shall be paid to them, but each arbitrator shall nevertheless, be paid the actual expenses incurred by them in the case. In that event the amount of such expenses shall be divided equally between the parties and shall be paid by them through the Chairman of the Arbitration Committee.

13. The arbitrators are judges and not advocates. The case must be presented for arbitration by the parties themselves or by others not members of the sub-committee of three arbitrators acting in a given case.

14. We quote herewith a proposed arbitration clause for insertion in your contracts in cases where you desire that the dispute under such contract shall be determined by our arbitration system.

ARBITRATION CLAUSE

"All disputes arising under this contract shall be arbitrated in the usual manner, unless there is a regular Arbitration Committee appointed by the National Wholesale Grocers' Association or the American Wholesale Grocers' Association and the National Food Brokers Association, and indorsed by the National Cannery Association, for the District in which the dispute arises, and then by three members of such Arbitration Board. The decision of the Arbitrators to be final and binding. Each Arbitrator to be paid Five Dollars (\$5.00) and necessary expenses. Cost of arbitration to be paid by loser."

AGREEMENT OF ARBITRATION

We, the undersigned, hereby agree to submit, and do voluntarily submit, to the Arbitration Committee appointed in the

City of by the National Wholesale Grocers' Association or the American Wholesale Grocers' Association and the National Food Brokers Association, and indorsed by the National Cannery Association for the consideration and adjudication of the said Arbitration Committee, a controversy now existing between us with regard to

We hereby agree with each other to abide by such decision as the said Committee may render in the premises and consent that the arbitration and decision may be by a majority of the sub-committee of three appointed to act in this case.

We agree that, upon request of the Chairman of the Arbitration Committee, the loser shall pay over to each Arbitrator the sum of Five Dollars (\$5.00), together with his necessary expenses.

And we further covenant and agree that the findings of the said Arbitration Committee shall be as binding upon us, our personal representatives, successors and assigns as would be a decision of the Court of Last Resort of the State of.....

(A)

And we do hereby authorize and empower the said Arbitration Committee, or such members thereof as act in the present arbitration, to determine what allowance, if any, shall be awarded; and we do hereby agree each with the other that the party against whom the allowance shall be awarded shall promptly pay the amount thereof to the other. Witness:

.....
.....

(Corporate seal or seals)

State of }
County of } ss.

On this.....day of.....nineteen hundred and.....before me personally came.....to me known, and known to me to be the individual described in and who executed the foregoing instrument, and.....acknowledged to me that.....executed the same.

State of }
County of } ss.

On this.....day of.....nineteen hundred and.....before me personally came.....

to me known, who, being by me fully sworn, did depose and say that he resided in.....that he is the..... of the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of of said corporation and that he assigned his name thereto by like order.

(A)

.....

It is understood that the allowance clause marked (A) in the above agreement is optional with the parties interested. This option must be exercised before the arbitration takes place.

NATIONAL DRIED FRUIT RULES FOR ARBITRATION

Arbitration is the modern method of equitably adjusting controversies that arise between buyers and sellers.

By arbitration a case is promptly settled by disinterested experts, who are primarily familiar with the general provisions of the contract and business customs pertaining to the question involved. It eliminates the expense, delays and technicalities of the courts and lessens the possibility of personal friction of feeling between the parties.

Parties to arbitration see to it that their statements of the facts upon which claim or defense rests are fully, clearly and correctly set forth.

Arbitrators should proceed on the one great principle of exact equity as between the parties. Technical breaches of the letter of an agreement where its spirit has been observed and no resulting damage is shown, should be disregarded.

1. These Rules of Arbitration shall be known and designated as the "NATIONAL DRIED FRUIT RULES OF ARBITRATION."

2. Where in any contract arbitration is provided for under these rules and is applied for by either party to the contract, such arbitration shall in the absence of mutual agreement to the contrary be held at the city designated herein situated in closest proximity or most convenient to the destination of shipment, and such arbitration must be held at one of the following named cities, to-wit: Baltimore, Boston, Buffalo, Chicago, Cin-

cinnati, Cleveland, Denver, Detroit, Indianapolis, Kansas City, Little Rock, Los Angeles, the Twin Cities (Minneapolis and St. Paul), New York, New Orleans, Oklahoma City, Omaha, Peoria, Philadelphia, Portland, Pittsburgh, Richmond, San Francisco, Seattle, St. Louis, Toledo.

3. All communications relative to arbitration shall be addressed to the Secretary of the Association before whom the arbitration is to be held if in New York, Chicago, St. Louis, or San Francisco, and to the Chairman of the Joint Arbitration Board appointed by the National Wholesale Grocers' Association and the National Food Brokers Association in the cities of Boston, Baltimore, Cincinnati, Cleveland, Detroit, Denver, Indianapolis, Kansas City, Little Rock, Los Angeles New Orleans, Oklahoma City, Omaha, Philadelphia, Portland, Pittsburgh, Peoria, Richmond, Seattle, Toledo, Twin Cities (Minneapolis and St. Paul).

4. All arbitrations shall be held at some regular designated place in such city. The names and addresses of the various Secretaries and presiding officers shall appear upon or accompany all copies of these Rules of Arbitration.

5. All arbitration boards or committees shall be made up of a sufficient number of individuals so that in case of absence or inability to serve on the part of a member or members, or direct or indirect interest in the controversy which shall disqualify, there will be at least two additional members who may be called upon to act.

6. Three (3) arbitrators shall serve in all cases and the agreed decision of any two (2) shall be binding on all parties. The dissenting arbitrator shall, however, sign the findings (as dissenting thereto) and may give his reasons therefor.

7. The following shall be the form of request for arbitration:

....., 19....
To.....
.....

The undersigned requests that arbitration be held on
.....as betweenofand
ofbased upon the condition of a contract of sale
providing for arbitration under the National Dried Fruit Rules
of Arbitration and hereby agrees to absolutely abide by the
award and findings of the Arbitrators, and in the event of ad-

verse decision, to make prompt settlement, paying the fees and costs as provided for in said Rules of Arbitration.

8. A written statement of facts and anything else that may have relevant bearing on the case, together with written argument thereon may be presented to the Secretary of the Association or Chairman of the Arbitration Board as the case may be, and shall by him be submitted in its entirety to the arbitrators, but no oral presentation shall be made unless the parties agree thereto, or same is requested by the arbitrators.

9. Findings in all arbitrations shall be in conformity with the provisions of the Uniform Dried Fruit contract, as agreed upon and adopted by the National Wholesale Grocers' Association and the Dried Fruit Association of California.

If the dispute involves a question of quality or size, the arbitration shall be held upon agreed samples drawn and forwarded to the Secretary of the Association or the Chairman of the Board before whom the arbitration is held in accordance with the provisions of the contract between the parties.

10. The fee in all cases of arbitration shall be \$20.00, which amount shall be deposited by both parties in advance with the Secretary of the Association or the Chairman of the Arbitration Board, as the case may be, but the party in whose favor decision is rendered shall be entitled to a return of his deposit when findings are forwarded to him.

11. Out of the fee above provided for, the arbitrators shall receive the sum of \$5.00 each for their services and the Association or Board shall retain a like sum of \$5.00 to cover incidental expenses.

12. When a buyer claims an allowance only, he shall, pending award and after samples are duly drawn, be entitled to use balance of shipment.

13. The findings and award of the arbitrators shall be in writing signed by the arbitrators, fully set forth the facts of the case and a copy thereof shall immediately be furnished to all the parties to the dispute. The losing party shall bear any and all expenses connected with the forwarding of samples.

14. Before entering upon the duties of their office, the members of the Committee or Boards of Arbitration shall subscribe to the following oath: "You do severally swear that you respectively will faithfully and fairly hear and examine the matters in

controversy which may come before you during your tenure of office and to make a just award therein according to the best of your understanding, so help you God."

15. Where arbitration findings are based on samples and decisions against shipper, the samples upon which arbitration was held shall, on immediate request and at his expense, be returned to him for his information.

16. For the guidance of all parties to arbitration it shall be understood that five (5) full business days shall be considered "Immediate Shipment" and ten (10) full business days shall be considered "Prompt Shipment."

In order to facilitate the arbitration of disputes the National Wholesale Grocers' Association and the National Food Brokers Association have established with the approval of the National Cannery Association, joint arbitration committees in Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Denver, Detroit, Duluth, Indianapolis, Kansas City, Little Rock, Los Angeles, New Orleans, New York, Oklahoma City, Omaha, Peoria, Philadelphia, Pittsburgh, Portland (Oregon), Richmond, San Francisco, Seattle, St. Louis, St. Paul-Minneapolis, Toledo, and Wichita.

The American Wholesale Grocers' Association has established arbitration committees in Atlanta, Charleston, Chattanooga, Dallas, Fort Smith, Houston, Jacksonville, Memphis, Mobile, Montgomery, Nashville, San Antonio, Shreveport, Tampa, Vicksburg, Wilmington and Washington State.

NATIONAL-AMERICAN WHOLESALE LUMBER ASSOCIATION INC.

The Association is a strong advocate of arbitration of trade disputes. Many perplexing problems are submitted for arbitration, and aside from avoiding annoyance and delay, members have saved thousands of dollars in actual litigation costs. There were handled during

1924 and 1925 disputes aggregating over \$500,000. Members are required to arbitrate disputes with other members or with members of recognized lumber or other trade associations, as set forth in the bylaws. This willingness to submit differences on a friendly basis to fellow-lumbermen for decision has greatly enhanced the prestige of the wholesaler and is a potent factor in promoting increased confidence and good will throughout the industry. The procedure enables a concise and comprehensive submission of evidence, with provision for opinion by counsel on legal points. Disputants have a voice in the selection of arbitrators."

ARBITRATION PROCEDURE⁴

I. REQUESTS FOR ARBITRATION

(a) All requests for arbitration, whether from members or non-members, and all correspondence relating to arbitration shall, unless otherwise directed, be addressed to the headquarters of the Association at New York City, provided that correspondence on disputes between members located in British Columbia, Washington, Oregon or California, shall be addressed to the Seattle office of the Association, from which point the arbitration may be handled. Requests for arbitration between two non-members shall be subject to acceptance by a majority vote of the Arbitration Committee.

(b) The party requesting arbitration shall sign an arbitration agreement and also shall submit a brief synopsis of the dispute, whereupon the Association will promptly take necessary steps to obtain the consent and agreement of the other party to arbitrate. Forms of arbitration agreement may be had upon application to the Association.

(c) If the party complained of is a member he shall be requested to submit the case to arbitration, in accordance with the By-Laws. If the party is a non-member, he shall be invited to arbitrate. Should either party, whether a member or non-mem-

⁴Approved and adopted by the Board of Directors. Effective May 1, 1926.

ber, fail or refuse to arbitrate, the matter will then be referred to the Board of Directors or Executive Committee.

(d) No claim shall be arbitrated where the actual amount in dispute is less than \$50, unless upon application of either disputant, the Executive Committee or Board of Directors directs that same be arbitrated because of importance or principle involved.

2. FORM OF SUBMITTAL

(a) The detailed statement of claim must be filed by each party within 15 days after receipt by the association of the arbitration agreement properly executed by both parties; the statement must be submitted in duplicate; and the answer thereto, together with all correspondence or other evidence, must be filed by each party within thirty days after receipt of the statement of the adverse party. In the event of failure of either party to file his statement or answer within the times provided in this paragraph, the arbitration committee may proceed with the arbitration and make the award on the record before it. The Arbitration Committee may, if good cause be shown, extend the time for filing of the statement, answer or evidence by either party. Notice of the time within which detailed statement and within which answer and evidence must be filed shall be served by the association on each party.

(b) The Association shall thereupon send to each disputant a copy of the other's detailed statement of claim and each party may then submit to the Association his answer or argument.

(c) All correspondence submitted by either party must be chronologically and neatly arranged, and exhibits marked in numerical order.

3. FILES SUBMITTED TO COUNSEL

The disputants shall have the right to request that the files be sent to the Counsel of the Association for a legal opinion, and such opinion shall be rendered to the arbitrators for their general guidance. An opinion must be rendered where both disputants request it, but should either of them request that no legal opinion be submitted, the arbitrators shall determine whether a legal opinion is required. The arbitrators at all times

may call upon the Association Counsel for an opinion, but if the arbitrators conclude to dispense with a legal opinion both disputants shall be so informed, and upon the further request of either disputant the matter shall be referred to the Executive Committee or Board of Directors who shall finally determine whether a legal opinion shall be submitted. In rendering decisions, arbitrators shall state whether or not a legal opinion was submitted.

4. ARBITRATION COMMITTEES

(a) Disputes between members shall be referred to a committee consisting of three members, to be appointed by the Association from a list of at least six members submitted by the Association to the disputants for approval.

(b) Disputes between members of this Association and non-members shall be referred to a committee of three; two shall be appointed by the Association from a list of at least six to be submitted to the disputants for approval, which list shall include at least three members, plus a similar number of members or non-members who may be suggested by the non-member's association; the two arbitrators thus appointed shall select a third to act with them before proceeding with the consideration of the dispute. The failure or delay of either party to object within 15 days to the list of suggested arbitrators shall be construed to convey approval of such arbitrators.

(c) Disputes between members of this Association and members of other recognized lumber or other trade associations shall, with the agreement of the non-member, be referred to a committee appointed as now provided in paragraph (b), provided that in a dispute between a member and such non-member, the Association of which the latter is a member shall have the privilege of naming one arbitrator, the National-American Wholesale Lumber Association to name the second arbitrator and the two thus appointed to select a third to act with them before proceeding with the consideration of the dispute.

5. SELECTION OF COMMITTEES

No case shall be sent for consideration or decision to a point where either party thereto resides, or has such connections as might suggest undue influence or personal prejudice, unless such

action shall have been agreed to by both interested parties; provided, that disputes between parties located in the same city or district may be referred to arbitrators located in such city or district.

6. REFERRING CASES TO COMMITTEES

Arbitrations shall be referred to committees by means of a joint "Letter of Appointment" addressed and sent to each appointee, which shall briefly state the nature of the dispute and transmit copy of the regular "Instructions to Arbitration Committees." Each member of the committee shall be requested to notify the Association promptly should there be any reason why he cannot or should not serve. The committee shall be charged to carefully follow all instructions given, also, legal opinion of Counsel, if any, and to render its decision with as little delay as possible.

7. EXAMINATION OF DECISION RENDERED

Upon return of the files from the Committee to the Association the decision shall be carefully examined and in case the decision has not been prepared in accordance with the instructions, it shall be returned to the same or a similar committee for further attention.

8. RETURN OF FILES WITH DECISION

When the decision has been rendered in proper form the Association shall promptly send a signed copy of the decision to each party to the dispute, together with return of his file, receipt of which shall be promptly acknowledged. The parties shall also notify the Association in writing when the case has been settled in accordance with the decision rendered.

9. EXPENSES AND CHARGES ASSESSED AS COSTS

Members of Committees shall serve without any charge for their services. The Association shall pay any traveling or other necessary expense incurred by the Committee or any of its members and shall be reimbursed therefor in accordance with the finding of the committee. The latter shall definitely assess all such expenses as costs, against either or both parties to the case, as it may deem wise.

10. DECISION

The decision of a majority of the arbitrators, in all matters before it, shall be accepted by both disputants as final and binding.

11. INSTRUCTION-TO COMMITTEES

A set of "Instructions to Arbitration Committees" has been regularly adopted by the Standing Committee on Arbitration and is hereby made a part of these rules and regulations.

12. REPORTING DECISIONS

The Association may publish to its members and the public at large any arbitration decision, or a synopsis thereof, omitting the names of the arbitrators and disputants.

13. ARBITRATION CHARGES

For the purpose of partly compensating the Association for the additional expense incurred in the handling of arbitrations, the Association shall be entitled to a nominal charge of 5 per cent of the amount of money awarded under the arbitration decisions or collected through informal adjustment by the Association; the arbitrators shall in their decisions state whether one or both of the disputants shall pay this fee and shall name the amount on which the fee is to be based; a minimum charge of \$5 shall be made on collections or awards up to \$50, and a minimum charge of \$10 shall be made on awards or collections from \$50 to \$200, provided that in no case shall the fee exceed \$100.

LEGAL ASPECTS

THE SCOPE AND LIMITATIONS OF COMMERCIAL ARBITRATION¹

That two merchants of full age and mental competency should not be permitted by the laws of their country to stipulate for the adjustment and settlement of controversies between them exclusively by the arbitration of a fellow merchant, would seem incredible to a layman. It would seem incredible to most lawyers did we not actually know that such at one time was the law of England and that until the recent adoption of the arbitration statute in New York it was the law of our greatest commercial state, as well as that of most of the states of the union. There could be no better example of the vitality and persistence of a false doctrine when it is once lodged in the body of our common law than the history of the common law view of the invalidity of arbitration agreements. As a result of the earnest and persistent efforts to secure the adoption of a more enlightened policy, headed by the Chamber of Commerce of New York State, we now have placed on the statute books of the state of New York provisions making stipulations for arbitration obligatory and affording a convenient and expeditious procedure for compelling the performance of arbitration agreements. Our courts have upheld the constitutionality of this statute and are enforcing its provisions so that it is possible in New York, at least, for the parties to a contract to provide by agreement that controversies arising with respect to its interpretation or performance may be settled by arbitration. Similar legislation is being pressed

¹ By Harlan F. Stone, dean of the Columbia University Law School; now associate justice of the United States Supreme Court. *Academy of Political Science Proceedings*. 10: 501. July, 1923.

upon Congress and the several state legislatures and will no doubt be enacted into law and we may confidently look forward to the time when arbitration will become a recognized and accepted method of settling commercial disputes.

Zeal for the arbitration principle which has been hitherto devoted to securing the enactment of legislation is now being turned into other channels. A well developed propaganda is being directed toward inducing merchants to make the widest use of arbitration as the simplest, the least expensive, the most expeditious and the most satisfactory method of disposing of controversies between business men. Various merchants' organizations through campaigns of publicity are urging merchants to insert arbitration clauses in all their contracts and they are encouraged to believe that arbitration is a sort of universal touchstone of the law which will rob litigation of its terrors, relieve the courts of their congestion and bring to commerce the beneficent reign of justice and right, and all this without serious cost or inconvenience to litigants. There is in all this propaganda a very substantial element of well intentioned exaggeration and there is in consequence a very real danger that the benefits which may be hoped for from this useful reform will be seriously impaired by the reaction which inevitably follows exaggerated claims for the merits of any reform however useful and desirable it may be.

Arbitration is not a universal panacea for the evils of litigation. While there are many situations which may be dealt with more satisfactorily by arbitration than by litigation in the courts, this is by no means universally true. There are many controversies which can be adequately investigated and a satisfactory solution reached only by resort to the machinery of courts and established methods of litigation. The merchant who inserts an arbitration clause in a contract cannot always foresee what type of controversy will arise under it, and he cannot always

choose in advance of the actual dispute which may arise the best method of litigating it. Arbitrators are not always wise and just; they usually have less experience and less skill than judges in the art of investigating controversies and ascertaining the truth; they are certainly less subject to control and review than courts when the judges of courts do misconduct themselves. Existing arbitration statutes are defective in certain important particulars and the merchant who stipulates in advance to arbitrate all controversies arising under his contract may find that he has precluded himself from resorting to legal remedies which are vital to the preservation of his rights. He may find that the method of choosing arbitrators to which he has subscribed in his contract is the one least calculated to insure an impartial and judicial review of his case.

The time has come when in the promotion of the arbitration principle we should look realities in the face. If we wish to promote the cause of arbitration and make it a really useful device for avoiding in suitable cases the loss of time and money involved in litigation in the courts, we shall cease urging arbitration on merchants as a legal "cure-all". We shall frankly inform them that arbitration, like other methods of litigation, has its advantages and its disadvantages, and that he who does not make intelligent and discriminating use of it is likely to be disappointed in the choice of his remedy.

Legal controversies arise out of disputed questions of fact or of the law applicable to the facts, or both. The controversy of fact may be involved and intricate; the law applicable to it may be difficult to ascertain and doubtful. For the investigation and solution of such controversies we have a system of law and courts which are the product of some six centuries of experience. While no one, and least of all I, will make any claim of perfection for our judicial system, nevertheless I do assert that no better system has been devised for the settlement of controversies involving complicated facts or difficult

points of law. To say that such cases can be or will be better dealt with by untrained arbitrators who have had no experience in the examination of witnesses and in analyzing and sifting facts and who are not subject to any kind of judicial control or review, is to ignore the teachings of experience and to deny the value in the field of litigation at least of training, experience and expert knowledge. Moreover such assertion disregards the actual experience in dealing with complicated or difficult litigation by arbitration.

On the other hand the very refinements and complexities of our court machinery, which make it a more or less effective instrument for administering justice in the difficult or complicated case, often make it cumbersome and dilatory when applied to controversies involving simple issues of fact or law. This is especially the case when the issue of fact turns upon expert knowledge as to the nature or quality of merchandise or the damage consequent upon the failure to perform a contract for its delivery. There are of course numerous other examples of cases in which the real issue is one which can be better determined by a layman having training and experience in a particular trade or business than by judge and jury who have not had that training and experience.

That a controversy between merchants as to whether a particular delivery of merchandise satisfies the requirements of the contract in point of quality or as to what damages were suffered by its non-delivery could be more expeditiously and satisfactorily determined by fellow-merchants expert in the business concerned, would seem not to be open to dispute. What the merchant who is confronted with the question whether to arbitrate or to litigate in the courts must consider, therefore, is whether the controversy is really one better suited to the former or the latter; whether it is one to be solved by the expert knowledge and experience of his fellow-merchants or whether the controversy is one requiring a quite different

type of experience and skill, such as that possessed by judges, for its solution; and whether it is one demanding the protection and safeguards which the machinery of the law throws about litigation in courts.

If the controversy is pending, the answer to the question is usually not difficult. If on the other hand the answer is to be made in advance of the controversy by an arbitration clause inserted in the contract on its execution, the matter is not so simple. The New York merchant who during the war contracted for the purchase of a cargo of cocoa to be shipped from Africa to a Mediterranean port may have anticipated that the only controversy likely to arise would be with respect to the quality of the merchandise delivered, a controversy which could be best settled by arbitration, whereas it might eventuate that the controversy actually arising would be one with respect to the legality of the voyage because of war measures adopted by belligerent powers, or the frustration of the venture by virtue of naval control of the Mediterranean, or any one of a dozen issues requiring the gathering and presentation of evidence from foreign countries and its critical examination by men of legal training and judicial experience, if real justice is to be done.

I have no doubt that experience will demonstrate that general arbitration clauses should be used with much more caution than they are now being used, and that it may be found useful in particular trades or businesses to adopt a clause calling for arbitration only on specified enumerated types of controversy, which experience has shown can best be settled or adjusted by those having expert knowledge of the business, leaving other controversies to be litigated in the courts or by arbitration as may be deemed advisable when the controversy actually arises. At least this suggestion will indicate a field for study and investigation which our merchants' associations should take up and consider before we can hope that

arbitration will prove to be an altogether satisfactory method of disposing of commercial disputes.

A serious impediment to successful arbitration has been the customary method of choosing arbitrators. The usual arbitration clause calls for the appointment of one arbitrator by each side to the controversy and the selection of a third arbitrator by the two first chosen. The practical effect of this procedure is the substitution of a board of negotiation for a judge or a body acting judicially. When one resorts to arbitration he has usually exhausted the possibilities of negotiation and he desires that his controversy be *judicially* passed upon. The appointment of mere negotiators is likely to result only in an award which is a compromise disappointing to both sides with consequent distrust of arbitration as a method of settling controversies and dissatisfaction with its results. The practice of stipulating that the Arbitration Committees of Merchants Associations or Arbitration Societies shall act as arbitrators or that arbitrators shall be appointed by a committee of such an organization is one tending to insure the selection of arbitrators of judicial temper, which they are likely not to possess when selected by the parties themselves, and is a procedure which should be encouraged, if the arbitration method of settling disputes is to realize its possibilities. A system of arbitration which always results in compromise will not be a success. To avoid compromise arbitrators must be selected by some independent agency and the selection must be made of judicially minded arbitrators. Then we may hope to see in time a recognition and crystalization of business practice and custom by the awards of arbitrators rather than mere compromises arrived at by the ancient and time-honored method of "splitting the difference."

The business man must realize, too, that arbitrators are not always well intentioned, and that with the best intentions they are not always wise and just. Not all

men are judicially minded, and those who are, often require long training and experience before they become really competent.

I quote from an opinion of Mr. Justice Mullan, reprinted in the *New York Journal* of November 15, 1919, when he exercised the power which under our statutes can be exercised only in extreme cases, of setting aside the award of arbitrators. He said:

The objection that the proceedings were conducted so loosely and informally as not to constitute a valid arbitration is a serious impeachment of the whole proceeding. . . . In effect, the arbitrators made themselves witnesses without according to the parties the right to interrogate them concerning the manner of their examinations and the facts they found. The testimony of apparently competent witnesses, offered by the parties, was arbitrarily refused. No record worthy of the name was kept of the proceedings, and notice of meetings was not given the attorneys. I shall not attempt to lay down here any set of rules to govern an arbitration, but I am persuaded that this particular arbitration was not properly conducted. While it is quite possible that the arbitrators reached a wise and just conclusion, and while I am convinced that they acted throughout in the best of good faith, I am of the opinion that the award should be set aside. . . .

We may infer from this record that the parties to this particular arbitration at least appreciated the fact that a litigation in court has thrown about it some safeguards which are not afforded by an arbitration and that arbitration is not always a sure and speedy means of securing justice.

It is of the highest importance that merchants and trades associations should urge on business men the wisdom of choosing their arbitrators from selected lists of arbitrators prepared by such organizations and that in making such lists only men of known probity, sound common sense, and an adequate appreciation of the duties and obligations of their position should be selected.

And finally we shall do well to recognize that existing arbitration statutes are defective and should be amended before the program for arbitration is discredited, by the unfortunate experiences which may fall to the lot of some business men who have sought relief in arbitration from the burdens of litigation.

A referee appointed by a court to try the issues of a litigation in a judicial proceeding is subject to the control of the court and may be summarily removed for misconduct. An arbitrator appointed under our existing statute is not subject to such control; there is no provision for his removal; apparently he may misconduct himself with impunity. So far as the provisions of the statute are concerned he may refuse to proceed with the arbitration or to render his award and suitors before him are powerless.

The rights of a party to a contract or a controversy growing out of other transactions may sometimes be preserved only by resort to an attachment or an injunction or the appointment of a receiver in advance of the final determination of his rights. Such remedies can be had only on order of the court made in an action pending before it. An arbitration under our statute is not an action or a court proceeding and the usual arbitration clause under the provision of our statute precludes application to a court for any purpose except the appointment of arbitrators. The business man who unwarily consents in advance to a universal arbitration clause in his contract may awake to discover that he has stipulated away the privilege of using the very remedy which is essential to the preservation of his rights. By the time the arbitration has been had and the award made, assuming the arbitrators make the award with all possible despatch, it may be too late to secure the effective enforcement of the judgment entered upon the award.

These are obvious defects in the statute which should be corrected. It would seem that the statute should pro-

vide that arbitration should be an authorized method of conducting a trial in an action or special proceeding and that arbitrators should be subject to the control of the court in the same way and to the same extent as referees appointed by the court are subject to control. Pleadings and formal procedure may be dispensed with precisely as under our present arbitration law, leaving either party free to make formal application to the court for provisional remedies or for an injunction or a receiver.

If in these few remarks I have raised any doubts as to my belief in the wisdom and desirability of arbitration as a form of relief, which should be made available to all litigants, I hasten to say that these doubts are not well founded and I desire to correct any such impression. It is my belief that arbitration if discriminatingly and intelligently used, can be made a useful, economical and expeditious method of litigation in a somewhat limited field, and that courts, lawyers and business men should encourage and facilitate its use in that field. But the advancement of the arbitration idea and its ultimate acceptance and use by the business world are in some danger from the zeal and enthusiasm of its friends who are urging its indiscriminate use by business men without pointing out to them the limitations upon its utility. It is, I believe, not so important that we "sell" the arbitration idea universally—to use a popular phrase of the day—as that we make certain that the goods we do sell are of good and merchantable quality useful and satisfactory to the buyer. To that end merchants' associations and arbitration organizations will, in my opinion, do well during the next few years to devote their energies to four principal lines of activity, as follows:

- (1) They should agree, in conference with competent lawyers, upon an arbitration law which is free from the obvious defects of our present statute and more in harmony with our existing system of remedies, and press

for its enactment into law applicable in both the federal and state courts.

The necessity of adapting such a statute to local systems of provisional remedies may preclude the general adoption of a uniform statute.

(2) They should endeavor to mark out with some precision the field of litigation in which arbitration is likely to be a more satisfactory form of remedy than litigation in the courts, and to inform business men of the results of such a study.

This of course involves the abandonment of the effort to induce business men to stipulate in advance to arbitrate every kind of a controversy which may arise as well as the attempt to force arbitration upon suitors by legislation such for example, as the recent attempt in New York to secure the enactment of a law inserting an arbitration clause in the standard form of insurance policy, thus forcing arbitration upon insurer and insured. This bill, I am informed, fortunately failed of passage. It was of doubtful constitutionality and in any event, if enacted into law, would do infinite harm to the effort to secure general acceptance of arbitration as a useful method of settling commercial controversies.

(3) They should inform business men of the relative advantages and disadvantages of arbitration as compared with litigation in the courts so that they may make intelligent use of the remedies available to them, and, if it is found practicable, they should devise a form of arbitration agreement applicable in particular trades and businesses and to particular phases of controversies arising in those trades or businesses, and especially adapted to settlement by the arbitration method.

(4) They should stimulate in every possible way the effort to secure arbitrations which are judicial in character, not mere compromises, by the intelligent selection of arbitrators of known judicial qualifications.

A well directed campaign to accomplish these general purposes will do much to establish arbitration upon a firm and permanent basis and to give business men a justifiable confidence in its utility.

THE PROPER FIELD AND SCOPE OF ARBITRATION²

Arbitrators are not judges in the technical sense. They are not limited by the rules of substantive law or of evidence. They may receive and act upon evidence which would not be competent in any court of law, and in their decisions they may disregard the substantive rules either of statute or of common law. There is no appeal from their decisions on matters either of law or of fact. This fact in itself makes apparently a strong appeal to many lay minds. There is in the minds of many men a sort of feeling that justice is easy of attainment, but that lawyers and courts make it difficult to attain. They seem to have confidence in what we may call "inspirational" or impromptu justice. They seem to feel that the man who has never studied the history of human relations as recorded by the development of our system of law is likely to be more sound and more accurate in his search for justice between two contenders than is the man who has made a careful study of and who looks for assistance to earlier conflicts and decisions. The decision of arbitrators in any one case is no precedent for the decision of other arbitrators in a similar case. We feel that this condition is a source of danger if arbitration is to be used as a means of settling every class and kind of dispute. The danger will, however, disappear very largely if arbitration is limited to the settlement of disputes of a kind which are frequently recurring and which relate to matters of such a sort that the arbitrators can, in deciding them,

² From report of special committee of the Association of the Bar of City of New York. May 12, 1925. p. 273-82.

draw upon a well-established and recognized body of custom and trade practice. It is, of course, desirable that disputes should be settled with finality. It should be remembered, however, that by far the greater number of human dealings do not result in disputes, because they are conducted in accordance with fixed and recognized standards and rules. It is, we believe, supremely important to the public welfare that men in their dealings with each other should know with reasonable certainty what their rights and obligations are, so that disputes may be avoided and so that, if they do arise, the results may be fairly definite and certain. This is one of the great purposes of any system of law, and arbitration, if it is to be successful, must be reasonably certain in its results. If this is sound, then "inspirational" or impromptu justice is not a sure guide to the arbitrator. The true guide must be found in established customs, practices and standards. Such established customs, practices and standards are of the essence of law, and arbitration can be satisfactory and successful in the long run only if arbitrators are guided by them. If they do not exist or if they are ignored, then awards must inevitably be haphazard matters of individual whim. We will presently return to this thesis because we believe that it will assist in the consideration of the proper field and scope of arbitration.

We see no reason to criticize the resort to arbitration in the case of any existing dispute. Once the controversy has arisen, the parties are themselves fully competent to settle it in any way that they see fit, and if they agree to abide by the decision of some arbitrator, whether the primary questions at issue are those of fact or of law, no one can seriously object to their doing so. In this connection, however, the provisions of Section 1448 of the Civil Practice Act should be borne in mind. This section provides as follows:

§ 1448. *Submission to arbitration.* * * * *

A submission of a controversy to arbitration cannot be made,

either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy, or of habitual drunkenness.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

The principal questions which arise with respect to arbitration in New York arise in connection with the Act of 1920, which makes binding and enforceable agreements to arbitrate disputes which may arise in the future. With respect to the arbitration of existing disputes we are wholly in sympathy with the proposition that such agreements should not be revocable.

It is obvious that an agreement to arbitrate a future dispute can, as a matter of practice, come into existence only in connection with the making of a written contract between two or more parties. The arbitration of future disputes, therefore, has, as a practical matter, no relation to actions of any sort other than those resulting from a contractual relation arising out of a written contract. This is in itself an automatic limitation in the field of the arbitration of future disputes.

We believe that contracts for the arbitration of future disputes should, except in special cases, be further limited in practice to those fields where there is an established

body of custom and usage, where skillful and unbiased arbitrators can readily be found and where the questions likely to arise are of comparatively frequent recurrence. Indeed, this further limitation seems to be recognized by the common use of the term "commercial" arbitration. In our opinion, general agreements to arbitrate future disputes should not, except in unusual cases, be inserted in what we may call "casual" contracts.

The word "casual" is not entirely satisfactory and perhaps requires explanation. We use it in contrast with the term "commercial." By far the greatest number of contracts are commercial. They are made between persons who are engaged in some established commercial or professional field. Examples are numerous—contracts between wholesaler and jobber, between producer and distributor, between brokers or dealers in silk, cotton, steel or other merchandise. Here we have a constant and steady succession of contracts similar in nature and involving the same general elements of price, quality, delivery, etc. We have also established and recognized standards and customs known to all who pursue the particular field of commercial activity. By "casual" contract, on the other hand, we mean a contract other than one of this "commercial" sort, one which may be called unique, unusual and not of any common or frequently recurring type. In respect to such contracts there is no body of established custom and practice. Arbitrators in considering disputes which may arise will generally be as unacquainted with the matters as any court or jury. They will not be able to draw upon any body of trade custom, because there is none. They will have no standards to aid them. They will be dealing frequently with cases of first impression so far as they are concerned. In such cases we think that arbitration in so far as it contemplates future disputes is not really appropriate. Special reasons may, of course, exist for agreeing to it in advance, as, for example in a partnership contract, but we

think that in the case of such contracts an agreement to arbitrate all questions which may arise in the future should be inserted only after most careful consideration of the possible advantages and disadvantages.

The disputes which arise in commercial fields are disputes which can best be settled by men familiar with these lines of business. Their determinations are likely to be made in accordance with the recognized usages and customs of the trade. Quality of goods can be determined by them more accurately than by any jury. Matters relating to delivery and all of the other disputes which are likely to arise between two persons accustomed to deal in any of these fields are appropriate subjects for determination by arbitration. The questions of substantive law involved are generally unimportant or well settled matters of trade practice. In the unusual or "casual" contract, however, it is quite beyond the power of anyone to foresee the nature of the dispute which may arise and it may turn out to be of a sort which cannot be settled by arbitrators as well as by the courts and in respect to which the decision of any arbitrator is bound to be largely a matter of unconscious bias or personal whim.

In accordance with the principles which we have discussed above, it is, as we have already said, the opinion of this Committee that it is inadvisable that a general clause providing for the arbitration of all future disputes should be inserted in contracts of the "casual" type, unless after careful consideration of the particular case the parties should agree upon the inclusion of such a clause. We suggest as an alternative to a general arbitration clause in "casual" contracts the use of a clause limiting arbitration to disputes regarding particular matters of fact.

It is the opinion of this Committee that exchanges, boards of trade, trade associations or other bodies formed by the voluntary association of individuals engaged in similar fields of commercial activity should, if general

arbitration clauses are included in the forms of contract used or in the governing rules of the association, take appropriate steps to organize and maintain arbitration boards or committees which should be empowered to oversee and direct the general conduct of arbitrations between their members or others who may seek their assistance. The arbitration clauses used in contracts or submissions of existing disputes should provide that the arbitration shall be conducted subject to the rules of an appropriate Arbitration Committee or Board, such as the committee maintained by the particular organization or by a Chamber of Commerce, Arbitration Society, or the like.

It is the opinion of this Committee that the arbitrators in any particular case should be one or three in number and that these arbitrators should either be selected by the parties jointly or by the arbitration committee having jurisdiction of the general subject matter. We believe that the method frequently used whereby each party selects an arbitrator and the two so selected thereupon select a third as umpire does not lead to the most accurate or satisfactory results.

It is the opinion of this Committee that the various chambers, societies, associations, exchanges or special trades or fields of industry should by their rules be authorized in their discretion, and notwithstanding the existence of a clause providing for the arbitration of all future disputes, to decline to take jurisdiction of any particular dispute after it has arisen and to remit the parties to their ordinary remedies at law as if no such arbitration agreement had been made. Our reasons for this last recommendation are that disputes occasionally arise which involve chiefly questions of law or which are of a sort which can only be satisfactorily and finally settled by judicial decision. This recommendation is, as we understand it, in line with a provision of the English statute whereby the court is given a certain discretion as to requiring the parties, who have agreed in advance to

arbitrate, to proceed with the arbitration. The interests of justice, in our opinion, make it desirable that such discretion should be given to some judicial or semi-judicial body; otherwise an arbitration clause which has been entered into in good faith and which was designed to facilitate the settlement of disputes and to advance the interests of the parties may in fact turn out to be an instrument of great injustice to one or both of the parties. Such a provision is substantially incorporated in the rules of the Chamber of Commerce of the State of New York, The New York Curb Association and of the Silk Association of America.

In the English Arbitration Act and in the laws of a few of the States in this country there are provisions whereby, either during the course of an arbitration or at its conclusion, questions of law may be submitted to the court for advice or definite determination. We have considered this provision with great care with especial reference to its practicability in the State of New York. In our opinion, the incorporation of such a provision in the arbitration act of this State is not desirable. If arbitration clauses providing for the arbitration of future disputes are in practice limited in their use to the fields which we have attempted to define, if practical arbitrations in such fields are made subject to the general supervision of disinterested arbitration boards or committees appointed by reputable exchanges or associations and if such boards or committees are empowered to refuse jurisdiction over particular questions which may be presented, then, in our opinion, the practical need for such appeal to the courts on questions of law disappears.

DEFECTS OF THE PRESENT LAW

At the present time the statutory provisions of this State relating to arbitration are found in numerous sections of the old Code of Civil Procedure and its successor, the Civil Practice Act, and in the Arbitration Law of 1920 and the amendments thereto. It is, in the opinion of this

Committee, desirable that at some appropriate time all of these provisions should be assembled and codified in a single arbitration law. This is not, however, a matter for which there is immediate and pressing need.

There are, however, in the opinion of this Committee serious defects in the present arbitration law. Under that law as now interpreted a party to a contract containing a clause for arbitration forfeits or waives his rights to compel the other party to proceed with the arbitration if he himself commences an action upon the contract. The defendant in such an action may, on the other hand, stay the action and compel the plaintiff to proceed with the arbitration, but if the defendant appears and answers generally, he is also taken to have waived his rights under the arbitration agreement. It may not infrequently happen that the incidental remedies of attachment, injunction, receivership and arrest may be vital to the protection of the plaintiff's interests. Under the law of this State as it exists at the present time we know of no way in which the plaintiff can avail himself of these remedies without losing his right to compel arbitration.

In our opinion, it is desirable that the arbitration law of this State should be amended in such a way as to permit a party to an arbitration agreement to resort to these incidental remedies through appropriate court proceedings without thereby waiving his right to compel the other party to proceed with the arbitration. We believe that if such an amendment were proposed with the approval of this association as well as of the numerous exchanges, trade associations and of the Chamber of Commerce of the State of New York, its passage would not be seriously opposed and we favor the adoption at a reasonably early date of such an amendment.

Another point of the present law which calls for comment is the matter of equitable relief. The present statutes appear to contemplate a money award on the part of arbitrators. Nevertheless appropriate relief may frequently be equitable in its nature. It may in many cases

be the right of a party to have his opponent required to do or restrained from doing some particular act. We are informed that arbitrators have sometimes made their award in alternative form requiring a party to do a particular act or to refrain from doing a particular act, or in the alternative, to pay a stipulated sum. This form of relief is obviously not entirely satisfactory. We know of nothing in the statute which would prevent arbitrators from granting purely equitable relief, but it is obvious that the notions of arbitrators as to what is appropriate, equitable relief may frequently depart widely from the recognized fields of equitable jurisdiction. An award which grants equitable relief in such manner or form as might be granted by the court can probably be given legal effect by the entry of an appropriate judgment upon the award or by way of confirming the award, but where the award undertakes to grant relief in a way that an equity court would not grant relief, it would seem to be obviously improper that a decree of the court in accordance with the award should be entered. Anything less than such a decree can hardly be regarded as a confirmation of the award, but if the award is confirmed in its entirety, we may have decrees of a sort entirely unknown to the court or to our judicial system and of a sort incapable of enforcement.

We are of the opinion, therefore, that by appropriate amendment to the law, the court should be empowered to remit awards equitable in their nature to the arbitrators with general instructions as to the extent of the equitable jurisdiction of the court, so that such awards as may finally be confirmed by the court may be conformable to the usages and principles of our judicial system.

THE PRACTICAL WORKING OF ARBITRATION AT THE PRESENT TIME

It is impossible to assemble reliable figures showing the number of disputes which have been disposed of by arbitration during recent years. Such information as we

have been able to obtain, however, leads us to believe that the number of such matters runs into several thousand each year. It appears to be the fact that many of these matters are of minor importance from the money standpoint and that they are such as would ordinarily be litigated in the Municipal Court of the City of New York. There have, however, been instances of very important matters which have been settled in this way. We are also led to the conclusion that some of the matters arbitrated would not have been litigated had litigation been the only recourse of the parties. Nevertheless, arbitration does, as we believe from the evidence before us, lessen to some extent the volume of litigation before the courts. We doubt, however, that its effect in this direction is very great at the present time.

The actual results of arbitration have, we believe, been satisfactory in general, although this is also a matter about which it is almost impossible to make definite assertions.

Business people at large as well as the profession should realize that arbitration is not a panacea. That as regards future disputes in particular its appropriate field is limited and that as regards existing disputes there is very real difficulty in persuading both parties to settle their differences in this manner. We feel that its usefulness has been considerably overstated by some of its more enthusiastic advocates.

PROVISIONAL REMEDIES AND ARBITRATION ³

Your sub-committee was charged with the duty of studying and recommending amendments to the New York statutes which would give a party to an arbitration proceeding the advantage of those provisional remedies

³ By Kenneth Dayton, Walter C. B. Schlesinger, Walter S. Newhouse, from report of Sub-committee on Provisional Remedies, Committee on Arbitration for 1925-1926. Association of the Bar of City of New York. p. 50-7.

specified in the Civil Practice Act which he would have had if he had instituted an action in court. Prior to our appointment, the committee had determined upon the desirability of this reform. Accordingly, we have directed attention primarily to the preparation of an amendment but we have not considered ourselves precluded from seeking fresh light upon the need and prospective use of the remedies in this new field and making additional recommendations based thereon.

A cursory examination of the arbitration law and of the sections of the Civil Practice Act relating to provisional remedies will convince any one that it is not easy to harmonize the two proceedings. Arbitrations and the proceedings in connection with them are by statute made special proceedings. Provisional remedies are limited to actions. The obvious remedy of declaring that the provisional remedies shall apply to these proceedings as though they were actions, following the example of § 308 of the Civil Practice Act in relation to depositions, or of § 8 of the U. S. Arbitration Law with relation to admiralty proceedings, is wholly insufficient. The provisions of the sections dealing with provisional remedies assume the existence of a considerable number of matters which are peculiar to actions as distinguished from special proceedings. They involve summons, complaints, answers, causes of actions, certain relief and similar matters.

Moreover, there may arise out of an arbitration agreement not merely a single special proceeding, but five separate proceedings are possible—(1) to direct a recalcitrant party to proceed with the arbitration, (2) to appoint an arbitrator where no method is provided or the method has failed, (3) the arbitration itself, (4) the motion to confirm the award, (5) the motion to vacate, modify or correct the award. It will be seen at once that the first two and the last two of these proceedings do not involve the merits of the principal controversy between the parties at all, that the moving party is seeking relief purely

incidental to this principal controversy, and accordingly, that the facts by which the right to a provisional remedy is tested are not directly involved in these proceedings and ordinarily would not be alleged at all.

The foregoing difficulties are common to all the provisional remedies. To reconcile specifically every difference between the sections dealing with arbitration and those dealing with provisional remedies would require a long and probably an involved amendment of the Civil Practice Act or of the Arbitration Law. It has seemed best to your committee not to attempt to reconcile these difficulties by specific direction that certain papers and certain steps in the arbitration proceedings should be considered equivalent to other papers and steps in connection with the provisional remedies and to make similar specific provision for every inconsistency. We have felt that it would be more satisfactory simply to indicate the intent of the legislature that provisional remedies should be available to parties to arbitration agreements as though the ultimate relief which they sought from the arbitrators were the basis of the particular proceeding, and leave the courts themselves to harmonize technical inconsistencies. If the attitude of the courts were hostile to arbitration, this undoubtedly would give them the opportunity to defeat the intention of the amendment, but since they are in general very friendly to such proceedings, we believe that such a course will prove to be satisfactory.

Accordingly, we report that an amendment in the form of a new section to be added to the Arbitration Law, to be numbered § 6-b, and to read as follows, appears to meet the situation:

A party to, or claiming the right to commence, any proceeding under any of the provisions of this Act or of Article 84 of the Civil Practice Act may invoke the provisional remedies prescribed in the Civil Practice Act as though such proceeding were an action and as though the facts on which his claim for relief from the arbitrators rests were his cause of action and the re-

lief sought before or granted by the arbitrators were the relief for which the proceeding was brought.

We suggest this particular form because it covers the following points:

1. It takes account of the fact that the provisional remedies are to be granted in a special proceeding and not in an action.

2. It recognizes that the remedies may be sought either in a proceeding which is precedent to the arbitration, in the arbitration itself, or after the arbitration has been held and an award rendered, but before that award has been confirmed and judgment entered.

3. It permits the party to one of the incidental proceedings to set forth the facts upon which his claim to ultimate relief are based to support his plea for a provisional remedy although those facts may not be pertinent in the special proceeding itself.

4. The section apparently gives no rights to a party who moves to vacate, modify or correct an award already rendered, because he seeks no relief specified as a basis for provisional remedies.

Despite the fact that the committee has already recommended the adoption of some amendment of this nature, we recommend that further inquiry as to its particular need be made. The remedy of arbitration is still comparatively a novel one and subject like most major changes in the law to careful scrutiny by those opposed to or suspicious of it for whatever reason. In general, it seems far better to leave such changes in the law severely alone until they have proven their soundness beyond the possibility of successful attack, unless the defect is found to be a vital one. The remedy of arbitration has proven itself in New York, but such opposition as that voiced by the Committee on Uniform State Laws and its supporters at the last meeting of the American Bar Association cannot be ignored, and since both proponents and opponents of arbitration turn first to the New York law and its

operation for their arguments, it would seem impolitic to stir up any unnecessary discussion of the need for changes in it until opposition becomes less active. While the New York law is not threatened, any material changes in it give the opponents of the reform in other states a weapon which they will use with full effect. They were successful in blocking a satisfactory statute in Massachusetts last year, and the statute introduced in Rhode Island this year follows the recommendations of the Committee on Uniform State Laws and is not consonant with the New York law and the form recommended by commercial bodies here.

Whether the remedy is a very necessary one is a question upon which it is difficult to secure affirmative evidence. The large majority of trade associations which provide arbitration facilities limit their activities to the ranks of their members, and since they exercise disciplinary powers of their own, they are not greatly concerned with the provision of additional remedies at law. We know of only two organizations which undertake a general survey of activities and problems in the organization field. These are the Committee on Arbitration of the Chamber of Commerce of the State of New York, and the American Arbitration Association, Inc., which is the successor of the Arbitration Society of America, Inc., the Arbitration Foundation, Inc. and the Arbitration Conference Board. Mr. Charles L. Bernheimer, who has been Chairman of the Arbitration Committee of the Chamber of Commerce since its reorganization in 1911, states that in all his experience he has never so far as he recalls had presented to him a case in which the aggrieved party indicated a desire to invoke a provisional remedy. The cases which have come to his attention have been almost exclusively those arising out of commercial contracts. Mr. Mayper, of the American Arbitration Association, and formerly with the Arbitration Society of America, reports that such cases have come to his atten-

tion, notably in instances where the remedy of injunction was concerned. In one case which he mentions specifically, the contract was a personal service contract involving appearance on the stage, and in another a lease containing an arbitration clause was involved and summary proceedings were threatened.

In theory it seems that the use of provisional remedies in arbitration will be much more circumscribed than in actions at law. It is obvious, of course, that where the arbitration is held upon a submission agreed to after the dispute arises, there will be comparatively little use for any of these remedies. Ordinarily both parties enter into such a submission only if they are acting in good faith and are convinced of the good faith of their opponents. Moreover, a considerable number of the issues in relation to which provisional remedies may be granted are not probable or even possible subjects of arbitration. This includes personal injury and other tort cases and actions against public officials or based upon statutory remedies. An examination of the sections of the Civil Practice Act stating the grounds upon which the various remedies may be granted indicates the large number of these.

Taking the remedy of arrest, for example, it seems that of the ten instances specified in § 826 of the Practice Act only three or possibly four could arise out of a contract containing an arbitration clause, and all of these would be comparatively rare since they do not cover the case of ordinary breach of contract.

As to injunction, it seems probable that this particular remedy will be more often invoked in an arbitration case than any of the others. The insertion of an arbitration clause in contracts relating to real estate and personal service contracts, for example, is becoming quite common and probably more claims for injunction arise out of these two classes of cases than any others. Nevertheless, in our judgment the very great majority of arbitrations will continue to arise out of contracts involving the pur-

chase and sale of goods where the right to an injunction will not be asserted, and in our judgment the need for this particular remedy has not yet proven itself and may not be found necessary for some time.

As to cases of attachment, we have already shown that arbitration is not customary in personal injury and tort cases, and practically, therefore, we are reduced to a consideration of the provision permitting attachment in cases of breach of contract. The tendency to hold these mercantile arbitrations under the supervision of trade associations is growing, because it is these associations which are spreading the idea of arbitration in their own ranks. Frequently they find themselves in a position to exercise disciplinary measures against recalcitrants, especially up to the time that an award has been rendered, and from our inquiries, we do not find that they think the provision of these remedies is necessary. Moreover, the basis of attachment in the majority of cases is probably the non-residence of the defendant, and it is quite obvious that to cover this case there must be a further amendment either of the arbitration law or of the sections of the Civil Practice Act dealing with service by publication or personally without the state if attachment is to be available in arbitration proceedings. We have not considered the requisites of such an amendment.

The remedies of receivership or of disposition of property in litigation appear to have little practical application to arbitration cases.

It must not be forgotten that the whole basis of arbitration is a higher standard of business ethics than has heretofore existed. Arbitration is primarily a voluntary act and inspired by an appreciation of one's duty to carry out his contractual obligation in accordance with the common understanding of his associates. As the report of this committee very properly pointed out a year ago, agreements for future arbitration have comparatively little place in what the committee called "casual" con-

tracts. The use of the arbitration clause in the ordinary commercial contract is based upon this higher conception of business ethics. There will always be parties who will fail to recognize this obligation which they have entered into and the law must provide a sanction to prevent their avoiding their agreements. Nevertheless, this sanction ought not to be such that it will rest as a burden upon the shoulders of those who do perform their agreements willingly. It might lead to a very unhappy result if business men entered into arbitration agreements believing that thereby they were escaping the technicalities and delay of a legal proceeding, only to find that whatever their willingness to proceed with their agreements the law gave the other party the right in advance to assume that they would be dishonest and gave remedies based upon this assumption of dishonesty.

The right method of handling the problem can be shown only by experience. It is our suggestion that the proposed amendment should not be urged by this committee until some affirmative proof is presented of its substantial necessity. When that necessity arises, we have little doubt that the situation will come to the attention of this committee. Until that time, we recommend that in respect to this particular amendment the committee make haste slowly and specifically that the committee should not seek authority to urge the amendment until its necessity becomes more apparent than it now is.

SUGGESTED AMENDMENT TO ARBITRATION LAW

6-b. In their award, the arbitrators may require either party to pay a sum of money to the other by way of damages or to do or refrain from doing an act to the same extent as can be enforced by the judgment of the court specified in the contract or agreement of submission, or if none be specified, by the judgment of the Supreme Court.

SOME COMMON LAW RULES AND
COMMERCIAL ARBITRATION⁴

A single rule of law promulgated by Anglo-American courts has proved most important in checking the development of commercial arbitration. According to that rule arbitration agreements have been held revocable. By this is meant that, notwithstanding that parties have agreed to arbitrate either a then-existing and specified dispute, or have stipulated in a contract concerning some business transaction to arbitrate any disputes that may arise thereunder, either party has been allowed to litigate any such dispute in the courts and the arbitration agreement could not be pleaded to defeat the action. In a word, either party has been accorded the legal power to repudiate his arbitration agreement by proceeding in breach thereof by a lawsuit in the courts.

In the American courts this rule rests almost uniformly upon a single ancient doctrine. The antiquity thereof appears to date back to Vynior's case, a case decided in the English courts in 1609. In Vynior's case, Lord Coke is reported to have remarked that "a man cannot by his act make such authority, power or warrant not countermandable, which is by the law and its own nature countermandable." Of course this was remarkably dogmatic and legalistic truism. But with it started the doctrine of revocability of Anglo-American cases concerning commercial arbitration agreements. The modern formula for this dogma, however, appears not to have been fully stated and assigned to the rule by the English courts until *Kill vs Hollister*, decided in 1746. This formula, which the American courts have so freely recited, is to the effect that such agreements are against public policy and invalid in that they would "oust the courts of jurisdiction." We inherited our common law

⁴ From an address by Professor Wesley A. Sturges, Yale Law School. Printed here through the courtesy of the author.

from Lord Coke's utterance in 1609, and the formula of the assigned reason for the rule from *Kill vs Hollister*, decided by the English courts in 1746.

The foregoing formula concerning "ousting the courts of jurisdiction" has prevailed generally in the American courts. Recognition, however, of the occasion for the origin of the rule has led to some judicial query concerning the public policy of the rule. Judge Hough in *U.S. Asphalt Refg. Co. vs Trinidad Lake Pet. Co.* (1915) S.D. N.Y., 222 Fed. 1006, 1008, arraigns the doctrine with his usual insight and acumen as follows; "It has never been denied that the hostility of English speaking courts to arbitration contracts probably originated (as Lord Campbell said in *Scott vs. Avery*, (1855) 5 H.L. Cas. 811) 'in the contests of the courts of ancient times for *extension of jurisdiction*—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.' A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence of reason. . . ." This jealousy for power and for fees and this postulate of omnicompetence speaks itself in Lord Coke in another situation at about this same time. It will be recalled that he was in conflict with Lord Chancellor Ellesmere as to their respective powers until 1616 when under James I proceedings and judgments in Coke's court were made liable to the injunctions of the Chancellor. There was no political official to controvert Coke in the arbitration program; he therefore had his pleasure. Not only has this revocability rule prevailed generally despite its questionable ancestry, but also courts of equity have denied specific performance of the executory arbitration agreement and have refused to enjoin suits at law in violation of these agreements. Only if the parties have proceeded with the arbitration and an award has been rendered is this power of revocation terminated. The issues cannot

be tried again in the courts. Also, the agreement is valid in the sense that the breach by one party gives the other a cause of action for damages. Generally, however, only nominal damages are recoverable.

If arbitration is had and an award is rendered, the award may be enforced by action in the courts—at least if it is a final money award. On the other hand, an award will be vacated by the courts for sufficient legal cause. Fraud in procuring the award, or fraud or misbehaviour of the arbitrators in denying either party a fair trial are generalizations upon specific instances of sufficient cause to vacate. The question of jurisdiction of the arbitrators—in particular, what was submitted for them to arbitrate—is always open to judicial review. Decisions of matters of law and fact, however, are generally denied review by the courts unless the arbitrator's rulings in the given case are, in the opinion of the court appealed to, too unreasonable. With this report on the attitude of the courts toward this program of disputes adjustment, let us review some conditions which have led to recent changes by statutes.

It is commonly admitted that our social and economic life have evolved into a complexity almost beyond understanding. With this development there has accrued a phenomenal increase in the number and types of disputes calling for adjustment. In consequence court dockets, especially in commercial centers, have become swamped with untried cases. This is no reflection upon the industry of our judges; it reflects increases in the volume of litigation.

According to newspapers of recent date, the U.S. Attorney General is stated to have reported that 162,675 cases (civil and criminal) were pending in the United States Federal courts on April 30, 1925. 114,000 cases were reported to have been disposed of during the 10 months ending April 30, 1925. 126,000 new cases were docketed during the same period. In New York City,

now, according to the information of lawyers practicing there, a case may be called for trial within 23 to 26 months after it is docketed. In Cook County, Illinois, which embraces Chicago, a delay of from 18 months to 2 years may be expected. In Massachusetts, it is reported that 53,784 cases were pending in the Superior Court at the close of the year 1924, as compared with 31,695 so pending at the end of 1914; that 25,194 were added during the year 1924 as compared with 14,626 new cases entered in 1914.

I shall not dwell further upon this congestion, nor elaborate upon the effects of this pressure of cases upon the law making function of the courts other than to quote from Dean Roscoe Pound, of the Harvard Law School, as follows; "...the conditions of pressure under which causes are passed upon in the American urban communities of today where crowded calendars preclude the thoroughness in the presentation and deliberation in judicial study which were possible a century ago, prevents judicial law making from achieving its best. An example from the law reports will make clear what this means. In 4 Wheaton's Reports, reporting the decisions of the Supreme Court of the United States during the year 1819, decisions in 33 cases are reported. In other words, seven judges decided 33 cases in that year. In 248-251 U.S. Reports, we may see the work of that court a hundred years later. In 1919 the court wrote 242 opinions and disposed of 661 cases. If we look only at the opinions written, where seven judges wrote 33 opinions in 1819, nine judges wrote 242 opinions in 1919. . . . This does not mean merely that the judges are compelled to work rapidly and with a minimum of deliberation. In order to hear these cases at all the time allowed to counsel must be greatly abridged. In state courts the pressure has become even greater. . . . Thus at a time when constructive work of the highest order is demanded . . . in many of our states the courts are none too well equipped to do

the work effectively and in all of them the pressure of business is such that work of the highest type is all but precluded." I might supplement Dean Pound's figures with the report for the year ending April 30, 1924. If my count is accurate, the Supreme Court disposed of cases in excess of 725. On the same date, April 30, 1924, there were 462 cases pending.

Statutory changes and the development of commercial arbitration hereinafter referred to are not, however, the product of merely congested court calendars. A few of many of our *rules of law* established by the courts may be noted which, largely because of the antiquity of their origin and now living by the diet of *stare decisis*, are scarcely adapted to an efficient handling of modern commercial litigation, due allowance being made for the industry of our judges. These rules afford technicalities, make unnecessary expense to the parties litigant, unnecessarily disrupt their business, and consume undue time of the courts. One group of such rules may be mentioned. It is the rules of evidence concerning the *proof* of "books" of account, as they are called and the *proof* of communications by letter, telegraph and telephone. They involve the so-called principles of the so-called "hearsay evidence rule."

Suppose a shipper of goods sues to recover the purchase price of goods sold and delivered, the defendant denies delivery. If the plaintiff would offer his "books" as probative of the delivery, he must produce the *original books*; certified copies of the record of the particular items apparently will not do. His clerks must appear *en masse* to testify to their part in making the given entries. That the clerks made the entries several years ago; that they made only a particular entry concerning the items in their "clearances" from one department to another through the processes of the plaintiff's plant does not dispense with the necessity of their formal testimony. Their memory may be "refreshed" by the "books" as much as

possible by detecting their handwriting. This may be effective if the particular clerk did not share with the others a common course in business penmanship or the accounts were not recorded entirely by machinery according to real modern devices. By way of illustration of how such rules may work, I can best repeat a single experience of a New York firm of lawyers substantially as reported by one of its members: Defendants were sued on a guaranty of a bill of goods sold by plaintiff to X corporation, of which defendants were officers. The corporation admitted delivery and had given notes for the price. But defendant's counsel denied knowledge of any delivery. Plaintiff was obliged to gather up a score of former employees in a New Jersey factory, since abandoned; to bring on others from his Pennsylvania factory and spend two days in proof of what every one knew to be a fact. During the trial, defendants' counsel discovered one order out of more than 100 that had been manufactured by plaintiff in his Kentucky factory. Plaintiff abandoned his claim thereon of between \$600-700 rather than bring on the necessary Kentucky employees and records.

As illustrative of some of the technicalities in proving letters, I will quote from a recent Georgia case concerning the prescription of circumspection with which one must walk, in some jurisdictions at least, to prove that a letter was *mailed*. The witness testified that he *mailed* the letter. The opinion of the court follows: "there are some authorities which hold that the word *mailed* when used in reference to sending matter through the mails of the United States carries with it the presumption that the postage due on such matter has been paid. But in Natl. Bldg. Assn. vs Quinn (1904) 120 Ga. 358, that meaning does not seem to have been given to the word "mailed," it being there used rather to describe the mere act of depositing a letter in the mails. In this sense there *might be* such a thing as the mailing of an unstamped

letter. There was evidence that at least one of the letters was properly addressed and that both were deposited in the mail, but the evidence is silent as to whether they were duly stamped. Although the court states that "the presumption that a letter has been received when intrusted to the mail arises from the regularity in the method of business adopted by the postal authorities," it seems to have been more concerned in defining the word "mailed" in Humpty Dumpty fashion than in referring to other postal regulations, which are here assumed to be generally known, adopted to assure delivery of the unstamped letter to the addressee or the return thereof to the sender. Perhaps, however, we should say that counsel were at fault for not "laying proper foundation" as it is called.

Lastly one should not refrain from referring to *Hawley vs Whipple* (1869) 48 N.H. 487, as a leading and apparently prevailing doctrine concerning the proof of telegrams. It became material for the plaintiff to *prove* in court that a telegram was sent by one Gould in Montreal to the plaintiff in New Hampshire. Plaintiff sought to prove this by a reply telegram purporting to have come from Gould in Montreal following soon after a telegram sent by the plaintiff to Gould in Montreal. The reply appears to have been acted upon by him. Held, this reply was properly excluded. The court says: "Now it is claimed that, as in the case of a letter, so in the case of telegraphic dispatches, the person who answers a dispatch is so generally and uniformly the person to whom the communication was addressed that it may be safely acted upon, and that it is thus acted upon in all business arrangements of the country. But there is a difference *in principle* between the two cases . . . it results from the fact that the message are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the *original*. The *original* message whatever it may be

must be produced, it being the *best evidence*; and in case of its loss . . . the next best evidence. . . . It will be seen at a glance that there is nothing about the *hand-writing* here that could indicate that the message came from Gould. . . . This message *might* be received as it was sent, and *would ordinarily be acted on in the business of life*, but the only way to *prove* such a message *in a court of law* would be to summon *both* the intermediate *agents or hearers* of the messages, and in that way trace the message from the *lips* of one party until it was received in the *ears* of the other party. Anything short of that would be to rely on hearsay evidence of the loosest character."

From this scanty review of cases it appears that the so-called "hearsay rule of evidence" and the "best evidence rule" are strongly entrenched, business practice and costs to the contrary notwithstanding.

To the lay business man the courts, in applying these rules, appear to have the erroneous idea that every business transaction is vitalized by an assumption of the parties thereto that evidence is then being made for a future lawsuit between them. The entrepreneur's books have validity in the business community, independently of the original entries and of the entry clerks; they serve as the basis of transactions and calculations (balance sheets and credit insurance may be instanced); even the tax collector is credulous respecting them.

Taking account of what the application of these rules of law secures in these cases and comparing it with the costs and rupture of business which they cause, the question seems pertinent whether their administration is economical, whether it is worth while.

The extreme but recent Willetts-Herrick case in Massachusetts may be noted. Thirteen months (187 actual trial days) were spent in the Norfolk Superior Court in Dedham trying to prove a claim for \$15,000,000. Thirty 350 page volumes of testimony were taken; 954

exhibits were entered. The jury returned a verdict of \$10,534,109.07 after "being out" as it is called, 72 hours counting time for sleep and eating. That jury consisted of 4 clerks, 1 stonemason, 1 printer, 1 railway employee, 1 carpenter, 1 machinist, 1 painter, 1 retired minister, 1 shoemaker. This at a computed expense of \$50,000 to the one city and 27 towns of Norfolk county.

Again, it is generally admitted that the small-sum claimant cannot afford to use the courts. He cannot unless vengeance is worth the price.

Lastly, it may be recognized that lawsuits do not mend broken business relations. Restored good-will is no part of the judgment or decree.

The foregoing matters, among others, appear to me to be part of the stimuli for the present day commercial arbitration movement.

AMERICAN EAGLE FIRE INSURANCE CO. ET AL *vs.* NEW JERSEY INSURANCE CO.⁵

RESIGNATION OF ARBITRATOR—POWER OF REMAINING TWO ARBITRATORS

The Withdrawal of an Arbitrator After the Hearings and Immediately Before a Formal Award Does Not End the Authority of the Other Two Arbitrators to Make an Award, Unless the Terms of the Arbitration Submission Take the Case Out of the General Rule Governing Majority Awards.

COURT OF APPEALS.

Decided July 15, 1925.

In the matter of arbitration between AMERICAN EAGLE FIRE INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY, FIDELITY-PHENIX FIRE INSURANCE

⁵ From *New York Law Journal*, August 24, 1925. This case is one of the most significant cases covering the powers and duties of arbitrators.—EDITOR.

COMPANY, GLENS FALLS INSURANCE COMPANY and HANOVER FIRE INSURANCE COMPANY (severally and not jointly), respondents, and NEW JERSEY INSURANCE COMPANY, appellant.

Appeal by New Jersey Insurance Company from order of Appellate Division, First Department, affirming order of Special Term, which denied motion of New Jersey Insurance Company to confirm the award made by arbitrators and vacating said award.

The facts herein are as follows: In the year 1920, pursuant to an agreement made in the latter part of December, 1919, New Jersey Insurance Company, appellant, issued one or more policies of reinsurance to American Eagle Fire Insurance Company, The American Insurance Company, Fidelity-Phenix Fire Insurance Company, Glens Falls Insurance Company and Hanover Fire Insurance Company.

New Jersey Insurance Company refused to pay losses under the reinsurance policies, claiming that they were invalid because of alleged misrepresentation and concealment. Accordingly, under date of August 22, 1922, the parties executed an agreement and submission to arbitration in which the dispute as to the validity of the policies was submitted to three arbitrators. Two of the arbitrators, Mr. Osborn and Mr. Ullman, were named in the arbitration agreement, and the third arbitrator, Mr. Cox, was later appointed by written agreement between the parties.

The arbitration agreement provided that an award should be made on or before November 1, 1922. This date was extended to December 1 by written agreement. The first hearing before the arbitrators was held on November 2 and hearings continued thereafter from time to time to December 4, 1922. A large number of witnesses were examined, approximately four hundred pages of testimony were taken and a large number of exhibits were submitted. At the request of the arbitrators the time within which the award might be made was first extended to December 15 and was later extended to December 22, 1922. Briefs were submitted to the arbitrators on December 16 and several sessions were held by them to discuss their decision. On the afternoon of December 21, the day before the date on which the award was required, pursuant to the last extension, the arbitrators held a meeting and requested that the parties

agree to a further extension of the time within which an award might be rendered. This was agreed to by the five companies, but was refused by New Jersey Insurance Company. Mr. Osborn, one of the three arbitrators, then stated at this meeting on December 21, in the presence of the other two arbitrators and of counsel for both parties that he felt he could not do justice to the case in the short time remaining, namely, prior to midnight of the following day, and that unless a further extension were granted he would resign. Meanwhile, Mr. Osborn had been in touch with respondents' attorneys and was obtaining cases from them to sustain their side of the controversy. A further meeting was held on the morning of December 22, at which Mr. Cox and Mr. Ullman, two of the arbitrators, were present. At this meeting was presented and read a letter from Mr. Osborn in which he said: "I must and do therefore resign." Mr. Osborn was not present at this meeting and took no part in any of the proceedings after the meeting of December 21. After discussion Mr. Cox stated that he and Mr. Ullman, would spend the rest of the day in going over the evidence, exhibits and briefs and that if he and Mr. Ullman, the other arbitrator, could concur in a decision they would render an award. An award was made and signed by them.

The first paragraph of the arbitration agreement provided as follows:

"First. The parties hereto name and appoint Frank H. Osborn and Albert Ullman as two of the three arbitrators herein provided for. In the event that Frank H. Osborn shall refuse to act as such arbitrator or having accepted the appointment hereunder *shall later cease to act as such arbitrator through death, resignation or otherwise, the parties of the first part shall elect an arbitrator from among the individuals* named in the list of 'proposed arbitrators' annexed hereto," and so as to each of the other arbitrators.

"Fourth. It is understood and agreed that the arbitrators, or a majority of them, are to determine whether or not the said policies are unenforcible by reason of any misrepresentation or concealment of material facts by the agent or agents of the parties of the first part or any of them.

"In the event that the arbitrators, or a majority of them, shall find and determine that the said policies are so unenforcible they shall find in their awards that nothing is due from any of

the parties hereto to any of the other parties hereto, arising out of the issuance of said policies.

"Fifth. * * * The awards shall be in writing, shall be subscribed by all of the arbitrators *unless only two of the arbitrators shall agree upon said award*, in which case it shall be signed by the two arbitrators so agreeing. * * * *An award by a majority of the arbitrators shall be valid and binding.*"

On December 20, 1923, New Jersey Insurance Company brought on for hearing before Special Term a motion to confirm the purported award made by the two arbitrators following the resignation of Mr. Osborn. The Special Term denied the motion, holding that under the express provisions of the first clause of the arbitration agreement the two remaining arbitrators were without power to make the award, in view of the fact that Mr. Osborn, the third arbitrator, had resigned or ceased to act, and held that the purported award was a nullity and vacated it. On appeal the Appellate Division unanimously affirmed, without opinion, the order of Special Term. The matter is now before this court as the result of leave to appeal granted by this court.

Frederic R. Coudert, Charles A. Conlon and Mahlon B. Doring for appellant; D. Roger Englar, Lamar Hill and George S. Bringle for respondents; Julius Henry Cohen and Kenneth Dayton for the Chamber of Commerce of the State of New York, intervening as *amicus curiae*.

Under the provisions of the New York Arbitration Law of 1920 and the Civil Practice Act (secs. 1448-1469), after the final hearing and submission of the controversy to the arbitrators, one of three arbitrators cannot by his resignation prevent the other two arbitrators from rendering a valid award under a submission agreement providing for an award by a majority and for the filling of vacancies in case an arbitrator resigns.

Crane, J., dissents, on the ground that the specific provisions of the submission agreement in question were intended to vary the effect of the statutes and to necessitate the appointment of a substitute for any arbitrator who should in good faith resign at any time prior to the decision of the arbitrators.

POUND, J.—The question is whether, after the final submission of an arbitration, one of three arbitrators may by his resignation prevent the other two arbitrators from making a valid award under a submission providing for

an award by a majority and for the filling of vacancies in case an arbitrator resigns. It is contended on one hand that while the final award may unquestionably be made by a majority of the arbitrators, nevertheless in case of a vacancy by resignation before the final award is made the agreement requires literally the choice of a substitute arbitrator before an award can be made; it is contended, on the other hand, that the arbitration proceedings proper, which require all the arbitrators to act, end when the case is finally submitted to the arbitrators for their decision, and that the withdrawal of an arbitrator thereafter is of no more importance than the equivalent of a dissent.

The Legislature by the enactment of the Arbitration Law of 1920, and this court by upholding broadly the constitutionality of the statute (*Matter of Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y., 261), have given a new importance to arbitration tribunals set up by the parties as a substitute for the courts in the settlement of controversies. To approach the consideration of the question we may therefore properly bear in mind the development of the common law of arbitration through the statutes to its present stage.

But first, *the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitration and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party*

or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of their conduct. Civil Practice Act, section 1452, prescribes the form of oath as follows: "Before hearing any testimony arbitrators selected either as prescribed in this article or otherwise must be sworn by an officer authorized by law to administer an oath *faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding.*

* * *

The oath may be waived, but the obligation remains. Although a known interest does not disqualify and the parties may not complain merely because the arbitrators named were known to be chosen with a view to a particular relationship to their nominator or to the subject matter of the controversy, they are entitled to expect that arbitrators thus chosen will proceed with indifference and impartiality.

Viewed with this background, the law forbids the arbitrator, even though he acts with good intentions, so to conduct himself as to defeat the purpose of the arbitration by acting either for his own convenience or in the supposed interests of the party by whom he is named, except as he has, under Civil Practice Act, section 1453, the naked power to withdraw before all the proofs and allegations are heard (*Matter of Bullard v. Grace*, decided herewith). He accepts responsibilities to which convenience and favor must defer. We may assume that Mr. Osborn's conduct was inspired by the best of reasons and with no intention to frustrate the arbitration for ulterior ends. Another might follow the same course of conduct that he followed with an eye single to his own convenience or the interest of his nominator to avoid an adverse decision. Such an untoward result should be avoided unless the law applicable to arbitrations permits the arbitration to be brought to so impotent a conclusion.

The provisions of the Civil Practice Act so far as practicable and consistent apply to arbitration agreements. Material provisions are as follows:

"SECTION 1451. Hearings by arbitrators. Subject to the terms of the submission, if any are specified therein, the arbitrators selected as prescribed in this article must appoint a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time upon the application of either party for good cause shown or upon their own motion, *but not beyond the day fixed in the submission for rendering their award unless the time so fixed is extended by the written consent of the parties to the submission or their attorneys.*"

SECTION 1453. Power of arbitrators. The arbitrators selected either as prescribed in this article or otherwise, or a majority of them, may require any person to attend before them as a witness, and they have, and each of them has, the same powers and respect to all the proceedings before them which are conferred upon a board or a member of a board authorized by law to hear testimony. *All the arbitrators selected as prescribed in this article must meet together and hear all the allegations and proofs of the parties, but an award by a majority of them is valid unless the concurrence of all is expressly required in the submission.*"

The scheme of the law thus divides the arbitration proceedings into two parts, (a) the hearing and (b) the decision and award. All the arbitrators must hear the allegations and proofs of the parties, but an award by a majority of them is valid unless the submission otherwise provides. Even when prior to the enactment of the Arbitration Law of 1920 agreements to arbitrate and submissions were arbitrarily revocable up to a certain stage in the proceedings, the Code of Civil Procedure, section 2383, drew the line thus indicated between the hearing

and the award. It read: "A submission to arbitration * * * cannot be revoked by either party after the allegations and proofs of the parties have been closed and the matter finally submitted to the arbitrators for their decision." Now that agreements to arbitrate are no longer revocable at the will of a party, but may be enforced by a party who is aggrieved by a refusal to proceed to arbitration, this limitation no longer has a place in the law and has been repealed, but it is significant that even under the earlier practice a party who stayed in until the final submission to the arbitrators for their decision could no longer trim his sails to shift his course when the wind of defeat began to rise.

At common law more latitude was allowed as to the hearing. Where the submission was to three, with power to two to make the award, two had power to hear where the third was notified and refused to attend or was willfully absent (*Crofoot v. Allen*, 2 Wend., 494), but by the Revised Statutes (now Civil Practice Act) all the arbitrators were required to hear all the proofs and allegations of the parties; otherwise the award was a nullity (*Bulson v. Lohnes*, 29 N.Y., 291). No further change was made in the common law. It is not said that all the arbitrators must participate in making the award. That is an exception to the general rule which may be expressly stipulated for by the parties. All the arbitrators should be notified to meet for deliberation so that opportunity for full consultation is furnished, but it is not the rule that one may then by willful absence—and resignation at this stage is no less than willful absence—prevent an award by a majority. All should meet and hear the proofs, but the report of two is valid unless the third has been excluded from participation in their deliberations without fault on his part. The refusal of the third arbitrator to attend after final submission ceases to be material when its effect would be to juggle one of the parties out of the benefit of the arbitration (*Carpenter v.*

Wood, 42 Mass., 409). If an arbitrator may resign at the last moment, if concert of action in reaching a decision as distinguished from the award itself is necessary, no award could be reached in any case if at the eleventh hour one of the three found himself in the minority and sought to serve his own interests or those of the party naming him by resigning. The law does not contemplate that the edifice thus elaborately raised should be toppled over by such an untimely explosion from within. The salutary purpose of an arbitration is the summary and extrajudicial settlement of controversies between parties. The court should pause before permitting a technical and strained construction of the law or the agreement of the parties to defeat that purpose. If the law or the parties contemplate the possibility of an endless chain of frustrated arbitrations or the summary termination of the submission when the pen is in the hand of two of the arbitrators to sign an award, the meaning should be unmistakably expressed. It is highly improbable that any arbitration agreement or submission to arbitration would be made if it would involve the parties in such absurd consequences. Laws should be construed sensibly and plain purposes should not be defeated by narrow interpretations.

It follows that the withdrawal of one of the arbitrators on the threshold of a formal award does not end the authority of the other two unless the terms of the arbitration submission take the case out of the general rule governing majority awards. The arbitration agreement and the Civil Practice Act should be read in harmony where harmony is possible. Literally the agreement provides that if an arbitrator ceases to act a substitute arbitrator shall be chosen. But the substitute clause need not be read so crabbedly as to permit an unreasonable result in flat contradiction of the common and statute law. The letter should be enlarged within legitimate bounds rather than limited when the end in view may thereby be more effectually accomplished.

Under a fair and equitable interpretation of the submission agreement a vacancy caused by the withdrawal of an arbitrator need not be filled after the case has been heard, considered and practically decided. The withdrawal at that point does not prejudice the rights of the parties to a hearing before a full board and an award by a majority or make necessary a rehearing of all the allegations and proofs of the parties before a substitute arbitrator.

The orders should be reversed, with costs in all courts, and application to confirm award granted, with \$10 costs.

CRANE, J. (dissenting)—The Arbitration Law is based on contract. There can be no arbitration enforced upon the parties by the courts in the absence of contract. The contract of arbitration is to be construed like any other contract, and all of its terms and conditions given force and effect unless they are against public policy or illegal (*Matter of Zimmerman v. Cohen*, 236 N.Y., 15).

Article 2, sections 3 and 4, of the Arbitration Law are based upon previous existing contract. If the contract provides how an arbitrator shall be appointed in case of failure or neglect of one to act this method must be pursued. The court acts only on failure of the parties to live up to the contract. There is nothing in the law that prevents the parties from contracting for the appointment of three arbitrators, and that if one should resign after the hearings were closed, and before decision, another should be appointed in his place. In fact, this is what happens in case of death. Should one of three arbitrators die at the end of the hearings, and before decision, another arbitrator, in my opinion, would have to be appointed to take his place. An award by the two living arbitrators would be void.

The result is the same when one of the arbitrators ceases to exist as such by resignation. He is actually dead to the proceeding. The case would be different if his resignation was brought about by the action of the party appointing him or was done in bad faith. We must assume in this case, after the unanimous affirmance, that Osborn's resignation was in the utmost good faith; and it is conceded that the respondents are not the cause, but the sufferers. They contracted for just such an emergency in the very first paragraph of the arbitration agreement.

"* * * In the event that Frank H. Osborn shall refuse to act as such arbitrator or, having accepted the appointment hereunder, shall later cease to act as such arbitrator through death, resignation or otherwise, the parties of the first part shall (1) elect an arbitrator from among the individuals named in the list of 'Proposed Arbitrators' annexed hereto."

The opinion of this court, in my judgment, amends and modifies this contract. The resignation of Osborn, it says, must take place before the hearings have ended and not after. There is no such limitation in the contract. The parties have agreed otherwise, and as I have before stated, I do not think the law prevents them from making such an agreement. Such a limitation does not apply, I take it, in case of Osborn's death after a hearing and before decision. Why should there be this limitation in the one instance and not in the other? Of course we must assume that there was the utmost good faith in the resignation. Bad faith changes all things. The cases where an arbitrator deliberately resigns in order to prevent an adverse decision can be dealt with when they arrive. This is not such a case.

The contract having provided for an arbitration, the decision was as important as the hearings. The respondents were entitled to an arbitrator appointed by them to discuss the case and present his views, whatever they were, and both parties were entitled to three arbitrators able to act and functioning as such at the time of the decision, although the majority vote of the three could make the decision (Civ. Prac. Act, sec. 1453).

Such is the contract, as I read it, which the parties have made. For these reasons I dissent.

HISCOCK, Ch. J.; CARDOZO, McLAUGHLIN ANDREWS and LEHMAN, J. J., concur with POUND, J.; CRANE, J., reads dissenting opinion.

Orders reversed, &c.

THE LONDON COURT OF ARBITRATION⁶

A notable *difference between our method* and the *London method* is that the London Court of Arbitration does not publish a list of arbitrators, although your Com-

⁶ From *Annual Report*, Committee on Arbitration, Chamber of Commerce of State of New York. May 1, 1919. p. 6.

mittee has been informed that they have available a very carefully selected one. When a case comes to be arbitrated before the London Court of Arbitration, the disputants do not know the arbitrators who are to serve them until they finally appear before the Court. Mr. Jerrold-Nathan informs us that they consider this the more prudent course. Under our laws, however, we think better results are obtained by permitting the disputants to select their own arbitrators. Furthermore, the conditions surrounding the London Court of Arbitration are somewhat different from ours, for in many instances the cases brought before the London Court are between merchants of their own country and of foreign lands, necessitating an easy method for overcoming the obstacles here met with. The procedure followed by your Committee in dealing with international disputes, and one which we have found practical, has been to request a Power of Attorney from the foreign merchant, authorizing the Chairman of your Committee to act in his behalf under the rules and regulations of the Chamber of Commerce.

VOLUNTARY TRIBUNALS[†]

A DEMOCRATIC IDEAL FOR THE ADJUDICATION OF PRIVATE DIFFERENCES WHICH GIVE RISE TO CIVIL ACTIONS

Never in history was there a time when thinking men were called on to more carefully and courageously examine into the foundation and structure of our social and political institutions. Every one who has watched the recent development of the new political doctrines of the initiative, the referendum and the recall, the short ballot, proportional representation, popular election of senators, the new forms of municipal government, etc., and observed the slow but sure changes these are effecting

[†] By Percy Werner. *American Law Review*. 56: 852. November, 1922.

in our institutions, must realize that there is a force at work in society, doubtless the growing spirit of democracy, which is gradually but inevitably remodeling all our institutions. This growing spirit of democracy seems to betoken the dawn of a new age, and it will be well for us to examine whether there are any evidences that this new spirit has touched that institution which must ever be our chief concern, both as lawyers and citizens, which has to do with the enforcement of law and the administration of justice in society—the most fundamental and vital of all our institutions, the very cornerstone of society.

That there is a widespread feeling throughout this country that our bench and bar are not meeting the demands of the present age, that there has been manifest a growing distrust of our courts and a growing disrespect for our laws is lamentable, but too evident. Matters have certainly come to a serious pass when lawyers like William H. Taft, Prof. Vance and Moorfield Storey level the criticisms which will be found in Mr. Storey's addresses to the Yale students. (See "The Reform of Legal Procedure" by Moorfield Storey.) Mr. Storey, at the time he gave currency to these grave criticisms of bench and bar, added this picture of a judge in action, taken from the address of a Kentucky judge to a bar association of that state: "Our jealousy of the judge is such that we have formulated a set of hard and fast rules for his guidance—absolute rules of evidence, strict review of every act, word or ruling by the Court of Appeals. We have devised special machinery to eliminate the personality of the judge. At the same time we have given increased rein to the advocate as well as to the shyster, till now the judge must daily 'sit like a knot on a log' and listen to speeches to the jury—speeches that are the disgrace of our civilization—and daily watch practices which he is powerless to prevent and which are recognized by all the community as void of all semblance

of morality. To make matters worse, we have made our judges—all of them—mere puppets of political parties, so that it is impossible for them or any of them to be independent as I know every one of our judges would wish to be."

But that the bar of our country is aroused, and is endeavoring honestly and courageously to examine into and find remedies for the just complaint is, while largely confirmatory of the charges that have been leveled at our courts, a healthy and most encouraging sign. The fact that all our efforts are directed towards reforms in *procedure* is conclusive evidence that we, as lawyers, are fully conscious of where the defects in our mode of administering justice lie. It is not with our *substantive*, but with our *adjective law*.

The character of the suggestions put forth by the bar of the country relating to the substitution of elastic court rules for rigid statutory procedure, for liberalizing artificial rules of evidence, for the simplification of pleadings, the abolition of terms of court, for extending the judicial discretion, for making the writing of opinions by our appellate judges volitional and not compulsory, for better courts with greater powers, all prove this, if proof be needed.

Again we lawyers recognize that it is chiefly with the administration of our criminal laws, and with the decisions of our courts in cases involving the constitutionality, construction and operation of our evergrowing and widening laws affecting the social welfare, that the complaints have been loudest and most insistent. The public can hardly be said to be agitated over the deficiencies in the settlement of private disputes. In other words, it has been in the enforcement and administration of our *public* rather than of our *private* laws that our weakness lies.

That there has been very general and grave complaint as to the technicalities of procedure and the consequent

inefficiency, delay and expense involved in the course of ordinary litigation between private parties we know to be but too true, and this comes so close to most of us, whose chief occupation has to do with this character of litigation, that we are apt to overlook the real source of the dissatisfaction with our courts which the great body of our people are evincing, and the correction which public opinion is loudly demanding. That the public should feel its chief concern to relate to the administration of our public laws, that their chief interest should lie with the disposition of cases, the decision of which affects the public at large, rather than with the determination of cases which, at least directly, affect only the parties immediately involved, is natural enough. We must remember that the great majority of our people seldom, if ever enter into litigation, and consequently have no contact with, or opinion about, private law and its enforcement; while on the other hand the laws affecting them collectively are constantly in their minds as the interpretation of their most vital institutions.

There is indeed something shocking about our present method of making permanent public records of every petty private disagreement between individuals in society. It would seem that to be publicly haled into court to settle a mere private dispute, unless all other methods failed, might rather be regarded as an invasion of the sacred right of privacy.

It is perfectly evident that the first concern of lawyers and judges in this country must ever be the administration of our laws so far as this affects the public—the enforcement of our criminal laws, and the wise administration of that vast and steady stream of social legislation that is so characteristic of our young and growing republic. Whilst lawyers are conservative, we are not cowards. We are not afraid of changes. True our habit is to look backward to precedents, but we do not shut our eyes to the fact that mankind, in its institutions, does

progress. While we realize that our very conservatism is what gives stability to society, we realize, too, that our laws and institutions must keep pace with this progress, or trouble is bound to ensue; and though we follow and may not lead, we appreciate our great purpose is to regulate, control and systematize the relations of men to each other, and their relations to the state, as these relations change in the progress of civilization.

ARBITRATION MAKING HEADWAY

An intelligent and virile people has a singular faculty for evolving, apparently instinctively, the remedies for the evils from which they suffer, and it will pay us to discover whether our people of themselves and for themselves have indicated any way out of the difficulties which beset us. A glance at what is going on in society at large in the way of the adjustment of differences reveals the remarkable headway that arbitration, as a method of procedure for such purpose, has gained. It is, of course, on everybody's tongue in relation to the settlement of international differences. (The science of astronomy was studied centuries before scientific agriculture was dreamed of.) For years the commercial exchanges of this country and of foreign countries have had arbitration committees specially constituted to provide a means for the speedy and inexpensive adjustment of the private differences between members, and to avoid resort to the state tribunals for such purposes. In some of the unincorporated associations this method for the adjustment of differences between members is compulsory. Recently a plan was elaborated by a special committee of the chamber of commerce of the state of New York, for submission to the international congress of chambers of commerce, participated in by delegates from England, France, Germany, Spain and other European countries, for the international arbitration of individual commercial disputes. This plan was submitted at a meeting of the

Congress held last June in the city of Paris, with the result that the following report was adopted:

The congress expressed the desire; that chambers of commerce and industrial and commercial associations that are united in respective federations, or that are linked together by federative relations, organize international arbitration committees, assorted in accordance with professions or groups of kindred professions; therefore, be it

Resolved, That the permanent committee of the congress convoke a technical international conference formed by representatives of chambers of commerce and industrial associations, to be assisted by jurists of the different countries represented at the congress, for the purpose of elaborating a preliminary plan for international conventions having for their object the regulation of litigation between citizens of different countries by means of arbitration proceedings; and that in this way the permanent committee places before the government of the French Republic its preliminary report, and petitions it to invite the other states into a diplomatic international conference, the object of which is to be the establishment of an international conference on arbitration proceedings (procedure) regulating litigation between citizens of different countries, this to be done on the basis of the above preliminary report elaborated by the technical conference.

And not only have our merchants' exchanges adopted the plan of arbitrating private trade differences between members, but we find that provisions for arbitration are being incorporated in all the important private contracts made today, including insurance contracts, railway construction contracts, building contracts, leases, international grain contracts, and contracts between employers of labor and labor unions. The proceedings under the workmen's compensation acts, which are now fast displacing the old laws of liability of master to servant, amount to little more than arbitration of questions as to extent of injuries and periods of disability. Thus we find that the people are pointing the way for the settlement of private differences, and for the disembarrassment of

our courts of the mass of private disputes which have overwhelmed them to such extent that their efficiency for the discharge of their great public function has been sadly crippled where not entirely lost sight of.

The arbitration statutes enacted by most of our states contain provisions giving to arbitrators selected by private parties the ordinary powers of a justice of the peace for the trial of disputes, and making provisions for the enforcement of the awards of arbitrators by giving to them the effect of judgments of courts of record. These statutes have been in force for many years. The practice of arbitration of differences grew up largely in colonial days in this country, though at the time Blackstone wrote, the English Parliament had enacted an arbitration statute. He says:

And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them as well in controversies where causes are depending as in those where no action is brought. *Blackstone, Book III, star page 17.*

The arbitration statutes of the various states of this country are all very similar in form. That arbitration, as heretofore pursued, has not, though encouraged by our courts, met with favor by the bar of this country, is true, and our opposition to it as a method of procedure I believe to have been entirely defensible. The arbitrators, usually three in number, chosen one by each of the disputants, respectively, and the third by these two in case of disagreement, were too apt to be blind partisans of the parties selecting them, to be men without any special qualifications for deciding the differences left for their determination—either by reason of knowledge of the law or of experience in the discovery of weighing of facts. They too often lacked the very first qualification of the judge, impartiality, as well as the learning and experience essential to the due administration of justice. Their judgments must of necessity have been crude, and the

justice meted out a rude compromise. No wonder lawyers, where entrusted with the protection of clients' rights, turned from such tribunals to our elective judges and juries with all their uncertainties, delays, appeals and interminable procedure. This opposition of the bar to the non-professional arbitration which we have known in the past is sharply voiced by Hon. William Renwick Riddell, justice of the Supreme Court of Ontario, in his address before the Illinois State Bar Association, delivered in Chicago May last, when he said :

Moreover such a course should be pursued that those who have disputes shall be desirous of having them decided on principle; that is, the superiority of the professional agent of justice, the court, should be manifest over the non-professional, the board of arbitration. The medical profession should feel no more regret at the prevalence of resort to the quack than the legal profession at prevalence of resort to (*non-professional, of course*), arbitration. (*Italicized words mine*).—*Law Notes, September, 1914, p. 105.*

And yet our appellate courts early and quite uniformly recognized that there was something in the procedure by private arbitration for the settlement of private differences that justified the assistance lent by legislatures in the enactment of arbitration statutes, and which called forth their encouragement. It is not amiss to stop here to remind ourselves of what the appellate courts of our own state, and some of the other courts have said regarding this practice.

Napton, J., in *Newman v. Labeaume*, decided in 1845 (9 Mo. 29), said :

Arbitrations being domestic tribunals, selected by the parties themselves, and tending to terminate disputes at less expense than would be encountered in the ordinary courts of justice, courts inclined to look upon their awards with indulgence.

Judge Bay, in *Bennett's Adm'r. v. Russell's Adm'x.*, decided in 1864 (34 Mo. 1. c. 528), said :

An Arbitration is a domestic tribunal, created by the will and consent of the parties litigant, and resorted to to avoid the expense, delay and ill-feeling consequent upon litigating in courts of justice. The arbitrators are generally selected from among the friends of the parties, and are not supposed to be well versed in the law, or the technical rules of evidence; but are expected to settle all matters in dispute untrammelled by the niceties of the law, and in a manner that will be just and equitable between the parties; and so favored is this tribunal by our courts, that they will not interfere with an award unless partiality, corruption, or gross miscalculation of figures can be shown, or the arbitrators have awarded on matters not submitted to them.

In *Tucker v. Allen*, Currier, J., 47 Mo. (1871), our Supreme Court said:

It may be remarked in this connection that courts have ever been disposed to encourage the settlement of difficulties by arbitration. The proceedings in such cases are regarded with favor and construed with liberality. . . . Our statute was plainly designed to encourage the adjustment of differences between parties by arbitration, by providing a summary mode of enforcing awards.

Said Blakewell, Jr., (1876), in *State ex rel. Kennedy v. Merchants' Exchange* (2 M. A. 96):

The law is not opposed to arbitration. On the contrary, it is said to be the policy of the law to encourage these domestic tribunals, although they may, if they choose, disregard the rules of law in their decisions, . . . so that it must have been felt that, in many cases, justice was promoted by a submission to a tribunal which could get at facts that the courts could not regard. . . . It is well enough that the parties should agree to resort to a tribunal which will do a rude and untaught justice between man and man, in consonance with all the facts and surroundings of a particular case.

The Supreme Court of the United States in 1854, speaking through Mr. Justice Grier (17 How. 344), said:

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a

mode of settling disputes it should receive every encouragement from courts of equity.

And the Court of Appeals of New York in 1877:

Upon any interpretation of the submission the award was not only within its terms but upon and in respect to the precise matter submitted, and is final. We are not at liberty to be hypercritical for the purpose of overturning the decisions of these domestic tribunals, and compelling a resort to the courts of justice. It would be better for the people if more of their controversies should be settled in the same way, and justice would be quite as likely to be done as when administered by the more formal methods of litigation in the courts. A liberal interpretation should be given to the submission, and the award made, to uphold the latter when it is not attacked for corruption or misconduct of the arbitrator.—*Curtis v. Gokay*, 68 N.Y. 300-305.

And the writer in the Central Law Journal in 1881 thus expressed himself (18 C. L. J. 101):

Unquestionably, much of the depression in litigation, the manifest reluctance of business men to engage in a contest, even when confident of eventual success, and the resort to such crude and antiquated devices as boards of arbitration, are due to those delays more than to any other cause. Defeat is better and cheaper than such prolonged conflict. A rough, irregular justice, or even injustice, which is administered promptly, is better in the eyes of most practical men, than the most exact and perfect adjustment of equities embodied in a decree which comes lagging in at the end of a prolonged contest, when some of the parties are dead, others moved away and have acquired new interests. . . .

We do believe that litigation is too slow, too expensive and, therefore, too vexatious to satisfy anybody. We think that the experience of counsel generally will show that the life of the average contested litigation varies from two to five years. This in a country where capital is turned over two or three times a year, is an absurdity.

Having thus indicated the trend of our people, and the attitude of our legislatures, and that of our courts towards arbitration as a method of procedure for the settlement of private differences which give rise to civil ac-

tions, let us see, first, whether the history of jurisprudence on its procedural side points in the same direction, and, if so, what, if anything, can be done by the bar of the country towards perfecting the method.

HISTORICAL BACKGROUND OF ARBITRATION

The student of jurisprudence is struck with the quite opposite characteristics of that which has come down to us from the ancient Oriental forms of government of theocratic origin, and that which developed out of the customs of northern European barbarians. No erudite comparison is necessary to reveal this. The contrast between the old custom of *sitting dharna* which obtained in India, where the creditor fasted in front of his debtor's door, until his debt was recognized and paid, with the custom which obtained among the self-reliant, liberty-loving ancestors of our Anglo-Saxons of helping oneself to what one believed his dues, even though this involved a physical fight, as it generally did, between the creditor and debtor, is enough to betray their different origins. And of the courses of development of a procedure in the administration of justice undertaken by nascent and growing states formed by peoples of such antithetical tendencies as those of the Orient and those of northern Europe carry down into their latest forms the spirit, respectively, which gave them birth.

Under what we may call the theocratic form of government the individual existed only as a means to the state as an end, personal rights and individual freedom were largely ignored, public and private rights were scarcely distinguished, and law was determined by tradition, and was largely the growth of unconscious custom, without question of right or wrong, expediency or in expediency. And yet from what was accepted as a divine revelation (Micah, vi:8), the Justinian triad, that the whole duty of man was to live honorably, not to injure another, and to render to every man his due, there was

slowly developed, in accordance with advancing morals and reason through the ages, and with the aid of the sages of the law, those wonderful maxims and that marvelous body of the Roman civil law which today forms the basis of all our modern substantive private law, together with a procedure entirely unlike anything we have inherited through the English common law.

On the other hand, under the anarchical government of the northern barbarians, there developed a courageous and constant exercise of the feeling of individual right, a spirit of self-reliance which, from unmeasured violent self help, passed under the control of the growing state, was supervised and restrained, and finally evolved, by way of the judicial duel, and the wager by battle, that body of law which is accepted by all self-governing nations today, and the procedure of our modern jury trials. On the one hand, we see Themis with her scales, on the other Odin, the God of Battles; on the one the judge as the conspicuous figure, on the other the contending advocates; on the one the principle "do no injustice," on the other "suffer no injustice" (see von Ihering's "The Struggle for Law"), the one feminine in spirit, the other masculine.

In its most highly developed form the procedure in Rome in the litigation of private differences provided the *praetor* before whom the proceedings were instituted, who referred the matter in dispute for decision to a *judex* or arbiter, who in turn was advised as to the law by the *juris consulti*, a class of students who made law their chief study and applied it to the complications of social life, advising those who solicited their opinions. These latter, the only lawyers engaged in the administration of justice, for the arbiter was a lay citizen of repute selected by the praetor or magistrate, became the so-called oracles of the state (*juris consulti domus oraculum civitatis*), and their opinions finally came to be looked upon as authoritative. On the other hand, under

the developed procedure which we have inherited from our Teutonic and Anglo-Saxon ancestry, we have a judge chosen from among the lawyers by a large electorate who presides as an umpire in the trial of issues of fact by a jury summoned from the citizens at large, whom he instructs(?) as to the law, whilst the lawyers employed by the contending parties fight the issues out with all the zeal and resourcefulness developed by the practice, and all in accordance with rules of evidence wrought out by the courts and of procedure laid down by the legislatures.

Is it, I submit, a far cry to suggest that in a new and reformed procedure, developed out of and retaining the best features of these forms of procedure, as applied to the determination of private rights, the *judex* or arbiter *be a lawyer*, selected by the *juris consulti*, (the lawyers engaged in the particular case), for his high character and special qualifications to sit in judgment in the particular case, and that the *juris consulti* step into the places of the advocates, and instead of furnishing opinions to their clients, represent the contending parties directly before the *judex*; and that between them, the arbitrator and the lawyers, they determine their own method of procedure best adapted to the situation of the parties and the demands of the particular case? This is what the resolution I am to present to you, on the subject of voluntary tribunals, contemplates and portends. Simple, dignified, honest, conciliatory, and democratic, I submit it offers one solution of the vexed question of procedure, so far as it applies to the determination of private differences which give rise to the ordinary civil actions which choke our courts.

The proposed procedure, stated in its simplest form, is this: Where parties having a private disagreement which they are unable to settle, resort to lawyers who are unable to bring about an accord and satisfaction, these lawyers shall elect from among their fellow-members of the bar a judge before whom to try their case, following

the statutory form for arbitrations. Their agreement of submission, stating the subject matter of the controversy, with, of course, sufficient certainty that it can always be used in support of proof of *res adjudicata*, constitutes the only pleading in the case. Mere matters of procedure, as to time, place and manner of trial are regulated by the attorneys and arbitrator, or controlled by the latter, as may best suit the convenience of all concerned. The arbitrator selected will naturally be a specialist in the law pertaining to the particular controversy, a member in high standing at the bar for character and learning. All testimony by any relevancy which the court thus constituted chooses to hear is introduced, as the experienced arbitrator, aided by the advocates of the respective parties, will know what, if any, weight to give to the testimony. No time is lost in waiting the convening of a term of court or for the case to be reached on a crowded docket; none in attacks and counter attacks on pleadings; none in empanelling a jury. The convenience of the parties and of the witnesses is consulted with reference to their attendance. Wearisome reiterations are abandoned. The opening and closing speeches of counsel and the charge of the judge are done away with. We are treading no untried field. This system is practically that of Continental Europe suited to the democratic tendencies of our people. (See article on "Reform of the Jury System," Green Bag, May, 1914). It has its roots in the perfected procedure of Roman jurisprudence. Our own equity practice borrowed from Rome is a close approach to it. It retains all that is best of our courageous, self-assertive and self-reliant Anglo-Saxon procedure. It does away with the distinction between law and equity so far as relates to practice, together with the technicalities of pleading, trifling exceptions relating to procedure, and rules of evidence which in our great distrust of juries exclude so many matters which are daily transactions of life, and gets down to the marrow of a controversy in a simple, speedy, direct manner.

The reports of new and interesting cases prepared by arbitrators, or counsel, for our legal periodicals, in lieu of the volumes of reports now literally spawned upon us, may be expected to continue the development in permanent form of our substantive law just as did the studies and *Responsa Prudentium* of the *juris consulti* of Rome develop her *corpus juris* which is our great heritage to-day. The state stands ready to exercise its supremacy and enforce the awards of the arbitrator just as it does now to execute the judgment and decrees of its courts. The latter still remain open for those who prefer to resort to them. Is this not a near approach to what Judge Riddell, heretofore quoted, calls "the ideal method of determining rights"—which he says "would be for the parties when difficulties arose, at once to lay the facts before a judge, and have an immediate decision"? The procedure is one which will obviously not become the general practice for many years, but if sound and in conformity with the genius of our people, it will ultimately prevail.

Every citizen is entitled to the easy establishment and full security of his rights by a procedure free from technicality and mystery. We are a self-governing, and a self-reliant, democratic people. A democrat prefers to stand squarely on his own feet rather than to lean up against the state. There has been too much of rushing to the legislature for aid of every imaginable reform. The "rain" of law has been terrific. Shall we, too, besiege our legislatures with demands for the reform of our procedure in the administration of justice, when we have command of the situation ourselves? The preliminary report on efficiency in the administration of justice, recently prepared by a group of eminent citizens for the National Economic League (Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound), contains much valuable matter. Among the suggestions made I cull these: "The need is for judges who are specialists in the class of causes with

which they have to deal." . . . "Rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity." . . . "Machinery is not the important thing. What is important is that experts be chosen. To that end it is essential that the bar be able to make its influence felt by selecting the authority and that tenure be secure. The bad eminence in rejecting social legislation achieved by elective courts in New York and in Illinois, the equally bad eminence with respect to technicalities of criminal procedure achieved at one time by elective courts in Missouri, Indiana, and Texas and the fate of the codes of procedure at the hands of an elective judiciary is not necessarily a mode of liberalizing the law. On the contrary the mediocre bench is almost certain to be technical." . . . "The best of which judicial lawmaking is capable may be expected only from the best type of court before which the best type of lawyer practices." With such suggestions in mind let us consider the possibilities of voluntary tribunals as a democratic ideal for the trial of private differences which give rise to civil actions.

Tremendous economic and social changes are under way. The position of the courts of this country is unique. Theirs is the last word in government. They sit above the legislatures. All legislation must pass challenge before them. Our courts, concerned now with economic and social questions, face work of incalculable importance. Blackstone under his sub-division of Public Laws mentions only crimes and misdemeanors.

Today our courts are beset with constitutional questions and questions of interpretation, construction and operation of public laws, statutes and ordinances, relating to hours and conditions of labor, to women and children, to wages, to relations between capital and labor,

to sanitary provisions, to public utilities, to municipal government, with not only the rights of all against each, as involved in our criminal laws, but of each against all, with the rights of property as against the rights of people, and with the rights of the privileged few as against the rights of the unprivileged many, arising under ever new forms of social legislation and embodying the moral and political theories of a young republic in the early stages of the great experiment of self-government, restrained only by its own self-imposed fundamental laws. The bar of this country must hold true to its historic place. To it society rightfully should look for its stability. It has ever been the preservative of those vital necessities of civilized life, peace and order and security. Never was the need greater for able, scholarly lawyers than in this transitional age. From our ranks our courts are recruited.

A sound system for the administration of justice must contain within itself the forces which tend to the elevation of bar and bench, and to an ever-increasing respect of the public for both. In the last analysis all of our institutions are designed to develop character, to make men. The old theory that the individual was but the means to the state as an end has in Occidental civilization no place. Here the state is the recognized means to the individual as an end. It has taken many centuries to sound the depths of the Master's saying that "the Sabbath was made for man, and not man for the Sabbath." We must remember that democratic state presupposes democratic citizens. It is the national feeling welling up through individuals which gives form and life to our institutions.

'Tis not the outward bond that makes the slave,

But the base, narrow thought within the man.

—See Denton J. Snyder's *"The State,"* p. 499.

We have seen that the procedure here proposed has evolved naturally from the past, has been thoroughly tried

in continental systems of jurisprudence, has been provided for in existing legislation, has been encouraged by our courts, is in line with tendencies already manifest among our people, and responds to the demand for expert judges. Its *basis* is the scientific differentiation between public and private law, between substantive and adjective law, now clear but slowly evolved in the history of jurisprudence. Its *effect*—to make professional what is now non-professional. What may be expected of it for the future? This is the great test. The keynote of western civilization, says Benjamin Kidd, is projected efficiency. Will it have a tendency to bring our people into closer friendly association without diminishing their self-respect and the inclination to stand up for their rights as they conceive them? Will it have a tendency to take out the bitterness of private controversies and the sting out of defeat? Will it have a tendency to bring about a better ordered, more self-respecting and mutually respecting people? Will it encourage rather than discourage the settlement of differences and thus make for real peace? Until individuals in society learn to exercise self-control and forbearance and a mutual respect for each other's legal rights, and a willingness to arbitrate private differences, can we reasonably expect it of their aggregations, the nations of the earth?

Again, will it have a tendency, by relieving our courts of the obligation of settling purely private controversies to exalt them in the eyes of the people, to make the people appreciate their great and lasting importance to the public welfare, and the prime necessity of filling the great office of judge with the very best type of our lawyers capable of understanding and discharging their great function as the final arbiters between the majorities and minorities, between the single citizen and the whole people, where these clash? Is it consistent with the now generally accepted suggestions for the improvement of our legal procedure?

Again, will it have a tendency to make better lawyers,

to redeem them from the suspicion and reproach which is too much their unhappy lot today; to put an end to technicalities, disingenuities and subtleties that delay, and to delay that defeats, justice; to make for straightforwardness, conciliatory, common-sense, upright advocacy; to make for specialization and expertness in their best sense; to elevate the bar itself to the dignity of the bench?

These are the great questions we have to consider. In this connection, I recall to your mind the words of warning and appeal of Woodrow Wilson:

Some radical changes we must make in our law and practice. Some reconstruction we must push forward which a new age and new circumstances impose upon us. But we can do it all in calm and sober fashion, like statesmen and patriots. Let us do it also like lawyers. Let us lend a hand to make the structure symmetrical, well-proportioned, solid, perfect. Let no future generation have cause to accuse us of having stood aloof, indifferent, half hostile, or having impeded the realization of right. Let us make sure that liberty shall never repudiate us as its friends and guides. We are the servants of society, the bond-servants of justice.

PUBLIC POLICY AND THE RELATION OF LAW AND ARBITRATION⁸

Sound public policy demands specific enforcement of arbitration agreements by the law. To argue that such enforcement should receive only the sanction of business opinion and should remain extra-legal, is unsound. An agreement for arbitration is a business contract. It should be as inviolable as any other business contract, and once it is violated the law should give an adequate remedy. There is a difference between an arbitration agreement and the ordinary contract in the fact there is no adequate remedy for a breach of the arbitration agreement except through specific performance. Damages are

⁸ From "The New Federal Arbitration Law," by Julius Henry Cohen and Kenneth Dayton. *Virginia Law Review*. 12: 14-20. February, 1926.

not and cannot be compensatory. It was not so long ago that even the remedy of damages was denied to certain forms of contract which are among the commonest in the business world. No one in this day of commercial activity could argue that the ordinary contract of sale or that commercial paper should not be recognized by the law and that obligations assumed thereby should be enforced only so far as the obligor felt the force of opinion. Such, indeed, was once the case. Before Lord Mansfield's day the courts of England were ignorant of the manner in which they should treat questions respecting the buying and selling of goods or marine insurance or promissory notes, or, indeed, any mercantile question.

Damages are not the only remedy given for breach of contract. They are the ordinary remedy because usually they are compensatory. Where in fact the loss cannot be covered by money damages, however, the courts have recognized the fact and given a remedy which was adequate. The right to specific performance or to injunction, as the case may be, is commonly recognized in the case of sales of real estate, of closely held stock, of property which is unique, or of personal services which can be rendered only by the individual employed. Why should a contract for arbitration stand upon a different plane? Why should the one class be entitled to legal sanction and the other to the sanction of opinion only? The treatment of arbitration agreements as extra-legal certainly has no tendency to accomplish abstract justice, as we have shown before. It leaves a broad path by which the dishonest party may escape from his obligations. Public policy, surely, does not require that this continue.

The relation of arbitration to the law bears directly on this question. We said at the outset of this article that there is no basis for regarding the development of the principle of arbitration and its practice as something hostile to the administration of the law, nor should there be any conflict of interest between business men and the

legal profession on this subject. On the contrary, the record is one of support by the legal profession,—in New York and New Jersey by the State Bar Associations, in the United States by the American Bar Association—with here and there only a murmur of dissent based largely upon misunderstanding.

The improvement of our procedural remedies has the constant attention of the organized bar throughout the country. Even when such changes amount to a reform of the entire procedural system of the state, there certainly exists no feeling that the new practice either is inimical to the interests of justice or to the legal profession. On the contrary, such changes are sponsored by the legal profession in the interests of the better administration of justice.

ARBITRATION IS A NEW PROCEDURAL REMEDY

Arbitration under the Federal and similar statutes is simply a new procedural remedy, particularly adapted to the settlement of commercial disputes. It clearly is not outside the law because it is provided for by statute. No more is it outside the established legal system, because under these statutes the proceeding from beginning to end may be brought under the supervision of the courts if either party deems it necessary. No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary. When the agreement to arbitrate is made, it is not left outside the law. Proceedings under the new arbitration law are as much a part of our legal system as any other special proceeding or form of remedy. It is merely a new method for enforcing a contract freely made by the parties thereto.

Arbitration is not a radical innovation. To be sure, it reaches the settlement of controversies by routes much more direct, much less hedged about by technicalities, much more with an aim to homespun justice, than do actions in the courts. But arbitration has too long a history,

too long a connection with Anglo-Saxon mercantile life, to leave room for any fear of its ultimate value when it is understood and used intelligently. We have referred briefly to the fact that practically all English mercantile disputes were settled by arbitration up to the time of Lord Mansfield's reform of mercantile law, due to the ignorance of the courts of commercial customs and the need of tribunals which would administer disputes according to such customs.⁹ It is probably used almost as extensively in England today. Americans have little conception of the extent to which English business administers and settles its own disputes through the media of organized trade associations with systems of arbitration, and in London through the London Court of Arbitration, which is managed jointly by the London Chamber of Commerce and the city itself.¹⁰ It will be equally surprising to the average American lawyer to discover the extent to which arbitration tribunals are already organized in America and operate even without the aid of the law. Associations representing businesses in the rubber, silk, produce, dried fruit, lumber and many other lines of business all have most efficient systems. Unfortunately, their value is largely lost to non-members of the particular associations. It is to be hoped that this situation can be remedied, and in a recent survey of the field by a single organization there was pledged the coöperation of between 500 and 600 trade associations and their local subdivisions. These included organizations ranging from international bodies to local Chambers of Commerce.

Neither is the relation of the lawyer to arbitration generally understood. We cannot stress too strongly the need for lawyers promptly equipping themselves with knowledge of this field. No lawyer is competent to give advice in this field until he has made the study of it which

⁹ See Cohen, *Commercial Arbitration and the Law*.

¹⁰ For an exhaustive study of the extent and practices of English arbitration, see Rosenbaum, "Commercial Arbitration in England," *American Judicature Society. Bulletin*. No. 12. October, 1916.

he makes of every other phase of the law with which he deals, but subject to this necessity for initial study and the occasional help of a specialist, needed in every branch of the law, the new arbitration statute has opened up to the general practitioner a new instrument through which he can offer to his clients a service and a result formerly denied them. Clients must be educated in the use of arbitration, and it is in this education that the opportunity of the lawyer lies.

Arbitration under the law depends upon a written instrument. Now, what is designed for use is subject to abuse. Like the promissory note, the bond and mortgage, or the will, the arbitration clause requires skill and intelligent understanding of its place in the scheme of contracts and of its limitations and of the safeguards against its misuse. Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time for delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. Speaking generally, it is a proper remedy for the determination of those classes of disputes which arise day by day in the common experience of the disputants and the individuals to whom the dispute is to be referred, where all meet upon a common ground. It is not a proper remedy for what we may call casual questions—questions with which the arbitrators have no particular experience and which are better left to the determination of skilled

judges with a background of legal experience and established systems of law.

If the lawyer will keep these elements in mind, will advise his clients of the simplicity and speed of the new remedy, but at the same time will caution them against its limitations and guard them against mistakes in the contract, in the submission, in the proceeding itself, he will have rendered them a new service and extended his own sphere of usefulness.

This brings us to another ground of opposition motivating a few members of the profession—a ground not usually discussed in public assemblies of lawyers, nor in a law journal. Nevertheless, let us meet this view as it must be met, frankly. It is a fact that the lawyer has a pecuniary interest in the practice of his profession, and in a situation of this sort, it is better to face this fact and its implications and remove misunderstandings which, without warrant, stand in the road of progress. The lawyer is trained in a particular profession, and the cost of that training and its value to him are impaired by whatever impairs its practice. He cannot help having, subconsciously at least, a viewpoint of self-interest. To admit this fact is not to demean the lawyer. It merely recognizes that the laborer in this field is worthy of his hire and must live. That viewpoint need not lead him into opposition to arbitration. To be sure, the expense and cost of settling disputes are greatly reduced by arbitration. But few stop, however, to reflect where this excess cost of litigation goes. As a matter of course, it is assumed that it goes into the pocket of the lawyer, but if the lawyer will sit down and analyse the manner in which his fees are distributed, he will soon find that **this is not the case.** The excessive cost of litigation is caused by the waste motion which is involved in it. It is caused by the tremendous overhead expense which this waste motion necessitates. There is no profit to the lawyer in maintaining a large organization to follow the details of court practice,

or in spending his own time in meeting the technicalities and the delay in our present system of law. No client wants to pay for that or takes it into account. It is the unquestioned experience of most lawyers that from their own viewpoint, as well as that of their clients, it is more profitable to settle matters in dispute rather than fight them to the end.

If any lawyer thinks exclusively in terms of financial return to himself, he lacks the spirit which we believe actuates the great majority of the bar. The object of his service, indeed the justification for his existence, is to attain the ends of justice as nearly, as quickly and as economically as he can. It is our conviction that there is now no system surer of reaching this end, in commercial controversies at least, than that of arbitration. But arbitration is equally expedient from the business point of view of the lawyer. The lawyer's real return comes upon the disposition of controversies to the client's satisfaction. There are clients so captious that they are satisfied only if they always win. Fortunately, they are few. The majority ask only dispatch, reasonable cost, and a fair presentation and hearing. In part, the attainment of these ends depends upon the lawyer, in part upon the system for the settlement of disputes. We think that experience shows that a proceeding in arbitration properly conducted and safeguarded more nearly attains these ends in a mercantile dispute than does an action at law. By advising its use, by disposing of business promptly, the lawyer commends himself to business men. He has a satisfied client, a smaller overhead, and a more immediate return to himself. Sound business management of the lawyer's own affairs does not in fact support the policy of larger fees with larger expenses, but does support a policy of smaller fees with larger net return. Arbitration properly conducted tends in this direction.

The lawyer is needed in arbitration proceedings. Experience proves this. His training in proper presentation

and in the differentiation of essentials and non-essentials is invaluable. The lawyer who will *forget technicalities* and who is equipped to handle business matters *understandingly* and expeditiously has open to him an entirely new field of practice.

We should think it strange indeed if the courts were found supporting or advocating a system which was against the interests of the law or of the profession from which the judges are drawn. Nevertheless, our own courts, while declaring that arbitration agreements were unenforceable, have been most insistent that the policy of arbitration was wise and that it should be encouraged and extended.¹¹

It may be asked why, if the courts were so certain that arbitration agreements ought to be enforced, they did not permit such enforcement. The explanation is to be found in our English system of jurisprudence. For many centuries there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts. This rule was so firmly established that our American courts did not feel themselves free to change the rule, but declared it to be the duty of the legislature to make this change. When the change was first made in the United States by the New York Legislature in 1920, the change was accepted whole-heartedly by the New York court in *Matter of Berkovitz*.¹²

Said Cardoza, J., writing the opinion for a unanimous court:

We are told that the promise to arbitrate when made was illegal and a nullity. Even before the statute, this was not wholly true. Public policy was thought to forbid that the promise be specifically enforced. Public policy did not forbid an award of damages if it was broken. * * * A promise that differences will be arbitrated is not illegal and a nullity without reference to the

¹¹ Canal Co. vs. Penn. Coal Co., *supra*, note 26; United States, etc., R. Co. vs. Trinidad, etc., Co., *supra*, note 21.

¹² 230 N.Y. 261, 130 N.E. 288.

law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. * * * Of course, we exclude cases where the contract is inherently immoral or in contravention of a statute. General contracts of arbitration were never subject to that reproach. In such circumstances as these, public policy does not speak as of the date of the promise that the parties shall have a remedy then unknown to the law. Public policy speaks as of the hour and occasion when the promise is appealed to, and the remedy invoked.

ATTITUDE OF THE LEGAL PROFESSION TOWARD ARBITRATION¹³

Contracts to settle dispute by arbitration were not enforceable in this State until the Arbitration Law of 1920 was adopted. It was hitherto possible for parties to submit a matter to arbitration without being obliged to conclude a settlement in that manner. Either party could revoke the agreement at any time prior to the final award. This state of the law sometimes led to the adoption of arbitration bonds whereby each party bound himself in a certain penal sum to carry out his arbitration agreement. This device, however, appeared to be unsatisfactory in many situations. The courts took the position that an arbitration agreement was contrary to public policy as ousting the court of its jurisdiction. The present arbitration law has changed this statement of public policy. In our opinion, there is no fundamental differences between a contract to arbitrate and a contract to do any other act, and in general we thoroughly approve of this altered view with respect to public policy. The courts of this State in passing upon questions of arbitration since the Act of 1920 have shown a disposition to enforce it with considerable liberality. We suspect, however, that considerable litigation will be necessary before the matter

¹³ From report of special committee, Association of the Bar of the City of New York. May 12, 1925. Karl T. Frederick, chairman.

is entirely clear in this State. There is at the present time considerable uncertainty as to the power of arbitrators and as to precisely what will be regarded as misconduct on their part. We are unable, however, to suggest any practical method by which this phase of the matter can be clarified without the aid of the courts.

We are of the opinion that the profession and this Association in particular should maintain a friendly and sympathetic attitude toward the more extended use of arbitration, always bearing in mind, however, that its appropriate field in respect to future disputes is somewhat qualified and limited. It is, in our opinion, desirable that this Association should lend its influence and aid to arbitration within its proper field. It is not, as we believe, to the interest either of the public at large or of the profession that this Association should in any way oppose the more extensive use of arbitration whenever, within its proper field, it can relieve the congestion of the courts, reduce the expense, delay and irritation to the parties and accomplish substantial justice.

* * *

In the course of its work, this Committee has become deeply impressed with one fact that, in our opinion, far transcends in importance the question as to how "arbitration is now working in New York". That fact is the unmistakable challenge to the bar implied in the increasing resort by the business community to arbitration, which challenge the bar has so far ignored.

When all is said and done, commercial arbitration is simply an extra-judicial method of settling disputes. A fundamental function of government is providing adequate judicial facilities. To be adequate, they must be satisfactory. The principal reason why the use of arbitration is increasing is that they are not satisfactory to the business man. Certainly if any group is charged with the correction of such a situation, it is the bar. The bar alone possesses the technical knowledge required to ap-

preciate the specific defects and practicable remedies of the law and would resent strongly any suggestion that an association of business men without legal aid should re-draft our practice and statutes to meet their own ideas. We think that a duty rests upon the bar to undertake a study of our legal system from the practical business point of view and itself to initiate reforms which this study may show to be desirable.

In large measure commercial arbitration is based upon procedural superiorities which that system has or is claimed to have over our established system for the administration of justice. In a lesser degree there is dissatisfaction with rules of substantive law which are intended to embody business practices and principles but are claimed not to accomplish their end. While parties who agree to arbitrate can limit their arbitration to questions of fact and leave questions of law to the courts, the common practice is to submit all questions to the arbitrators. We think that usually the paramount motive is to escape procedural technicalities and that persons who agree to arbitration ought to have their attention directed to the fact that by such an agreement they are abandoning the rules of substantive law, that they may reserve their rights in such rules from the arbitration and that if they give them up they should give them up as a matter of studied intent. It is quite possible that in many instances they are perfectly willing to have their conduct judged by business principles as applied by the arbitrators rather than by rules of law. The law ought, however, to embody these principles, and if it does not, it suggests that rules of substantive law as well as those of legal procedure may call for revision. Nevertheless, we think that business men should have their attention pointedly directed to the fact that they now waive such rules of substantive law, a matter which is not made clear by the propaganda in favor of arbitration which is now so actively carried on.

We believe that the bar, and particularly this Association, should take cognizance of this situation and meet the challenge by a thorough study and investigation of the *implications* of commercial arbitration, which are far more significant than the *working* of arbitration.—*Report of the official committee on arbitration for 1925-26. Association of the Bar of the City of New York.*

ARBITRATION LAWS

THE UNITED STATES ARBITRATION ACT

As approved by President Coolidge on February 12, 1925, the new United States Arbitration Act (Public—No. 401—68th Congress), effective January 1, 1926, makes valid, irrevocable and enforceable written provisions or agreements for the arbitration of disputes (involving \$3,000 or more), arising out of “maritime transactions” or contracts relating to “commerce” among the States or Territories or with foreign nations. The full text of this Act (which is similar in its fundamental principles to the State arbitration laws of New York, New Jersey, Oregon and Massachusetts) is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That “maritime transactions,” as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce,” as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

SECTION 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

SECTION 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

SECTION 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided*, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to

the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceedings thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

SECTION 5. That if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

SECTION 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

SECTION 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be

the same as the fees of witnesses before masters of the United States court. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

SECTION 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceedings hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

SECTION 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sessions. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If

the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

SECTION 10. That in either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

SECTION 11. That in either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

SECTION 12. That notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his

attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

SECTION 13. That the party moving for an order confirming modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

SECTION 14. That this Act may be referred to as "The United States Arbitration Act."

SECTION 15. That all Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

THE UNITED STATES ARBITRATION LAW AND ITS APPLICATION¹

Far-Reaching Legislation Recently Passed by Congress in the Interest of Sound Business Practice—Aimed at the Evils of Delay and Expense in Litigation—Measure Drafted by the American Bar Association's Committee and Approved by the Association—History and Legal Justification of Act.

On Lincoln's Birthday, President Coolidge signed the "United States Arbitration Law," drafted by the Committee on Commerce, Trade and Commercial Law and adopted and approved by the American Bar Association in 1922, 1923 and 1924. No piece of commercial legislation, no enactment at the request of lawyers has been passed by Congress in a quarter of a century comparable in value to this. The President of the New York State Chamber of Commerce says:

The bill is one of the most far-reaching pieces of legislation that has been introduced in recent times in the interest of sound business practices.

The bill was supported by business organizations from every part of the country. So thorough was this campaign, under the leadership of Charles L. Bernheimer, Chairman of the Committee on Arbitration of the New York State Chamber of Commerce, that not a single dissenting vote was registered in either House or Senate. At a time when the Bar is charged with lack of appreciation of the needs of business in modeling legal procedure, what greater answer to the criticism can be made than that the American Bar Association, with the support of the business men of the country, prepared and with the aid of the lawyers in Congress secured, the enactment into law of a policy changing an anachronism of three

¹ From Report of Committee on Commerce, "Trade and Commercial Law," American Bar Association. *American Bar Association Journal*. 11: 153-6. March, 1925.

centuries' standing and providing a machinery so simple that it requires only the action by trade bodies throughout the country and of business men generally to make its application effective?

HISTORY OF THE BILL

At the meeting of the American Bar Association in Cincinnati, in 1921, the Committee on Commerce, Trade and Commercial Law submitted, as part of its report, a draft of a bill for a uniform state arbitration law, a draft of a Federal arbitration statute, and at San Francisco, in 1922, submitted revised drafts of such bills, together with a revised draft of a treaty for commercial arbitration. In presenting the report in 1921, the late Francis B. James, Chairman of the Committee said:

I want to say that this Association last year specifically instructed the committee to report on arbitration—a subject which had not been taken up by the Commissioners on Uniform State Laws—and the committee at a public meeting perfected a state act upon arbitration, and recommended that it be adopted by this Association.

In presenting the report for 1922, the Chairman of the Committee moved its adoption, together with the thirteen recommendations made as resolutions on the part of the committee, and the motion was carried. The recommendations included the following:

That a resolution be adopted referring to the National Conference of Commissioners on Uniform State Laws for its consideration, the bill herewith submitted by your committee as to a Uniform State Arbitration Act.

On December 20, 1922, Senator Sterling in the Senate and Congressman Mills in the House introduced the Federal Arbitration bill in the form reported at the 1922 meeting of the American Bar Association. In each branch of Congress it was referred to the Committee on the Judiciary, but owing to the lateness of the session and the pressure of other important business, the bill was not re-

ported by the committees. In 1923, the committee in its report recommended that a resolution be adopted, approving the re-draft and its introduction into the next Congress. The report of the committee was adopted by the Association.

The Conference of Commissioners on Uniform State Laws in 1923 reported to the Association that it had "considered during the past year the subject of a Uniform Arbitration Act referred to it by the American Bar Association and . . . drafted an act which was debated . . . and to a large extent perfected. It was thought best, however, to re-commit this uniform act to the Conference Committee for further consideration. . . . It is confidently expected that the Conference will at the 1924 meeting approve a Uniform Arbitration Act and report it to the American Bar Association for its approval and recommendation to the various states for adoption."

On Dec. 5, 1923, in the House, and on Dec. 12, 1923, in the Senate, the Federal arbitration bills were again introduced by Congressman Mills and Senator Sterling, respectively, in the form printed as Appendix B in the 1923 report of the Committee on Commerce, Trade and Commercial Law. On Jan. 29, 1924, the sub-committees of the Senate and House Committees on the Judiciary held a joint hearing on the bills. On Jan. 24, 1924, the Committee on the Judiciary of the House made a favorable report on the House bill. On June 6, 1924, the bill was passed in the House. On May 14, 1924, Senator Sterling reported the bill, with amendments. It was passed by the Senate on January 31, 1925, the House concurred in the Senate amendments, and on February 12, 1925, the President signed the bill.

ANALYSIS OF THE ACT

Speaking in general terms, the act provides that written clauses providing for arbitration of future disputes contained in any contract relating to maritime trans-

actions (i.e., matters which would normally be embraced in admiralty jurisdiction) or involving interstate commerce shall be valid, irrevocable and enforceable except on the grounds for which any contract may be revoked. The same rules apply to a submission to arbitration of a controversy already existing. There are excepted from the operation of the statute, however, contracts for the employment of seamen, railroad employees and other workers in foreign and interstate commerce.

In addition to the declaration of the validity and enforceability of arbitration agreements within these two fields, the Federal courts are given jurisdiction to enforce agreements for arbitration or submissions and a procedure is established by which such enforcement can be had summarily. The jurisdiction exists in those cases in which, under the Judicial Code, the Federal courts would normally have jurisdiction of the controversy between the parties. The right of a party to libel a vessel or other property at the commencement of the proceeding, in cases otherwise justiciable in admiralty, is preserved so that this important preliminary safeguard is not lost by an agreement to arbitrate.

There are two possible steps in the enforcement of the agreement. In the first place, any suit commenced in a Federal court upon an issue referable to arbitration may be stayed until arbitration is had, providing the applicant for the stay is not in default with the arbitration. In the second place, the court may order the arbitration to proceed pursuant to the agreement, appointing an arbitrator itself if appointment under the agreement cannot be had.

The provisions for enforcing the agreement assure a prompt, speedy and non-technical determination of the merits both of the application for enforcement and of the matters in controversy. The proceeding is commenced by a petition to the Federal court which, except for the agreement, would have jurisdiction of the subject matter

of the controversy, seeking an order directing that the arbitration proceed in accordance with the agreement. Only five days' notice of the application is required, but service is to be made in the manner provided for service of a summons in that jurisdiction. If there is a dispute as to the existence of the agreement for arbitration or as to its performance, the court shall determine that dispute forthwith. A jury trial of the issue may be demanded, except in admiralty, and the issues are then to be submitted to a jury as though they were issues in an equity action, or a jury may be specially called. If no jury is demanded or if the case is one of admiralty, the court is to decide the question summarily.

Upon decision either by the court or the jury that the agreement or submission was made and that there is a default, the court will issue an order summarily directing the parties to proceed with the arbitration in accordance with the terms of the agreement, except that the proceedings must be within the district in which the petition for the order is filed. The court is empowered to appoint an arbitrator or arbitrators, if necessary. The entire proceeding except as to determination of the existence of the agreement, is to be heard as though it were a motion. The arbitrators have the power to secure the attendance of witnesses and to bring before them any papers which they need.

The parties may agree that a judgment of the court shall be entered on any award. They may specify the court, but if none is specified then the application shall be made to the court for the district in which the award was made. The judgment is secured by an application to confirm the award, which must be granted unless the award is vacated, modified or corrected. The award shall be vacated only when it was procured by corruption, fraud or undue means or there was evident partiality or corruption on the part of the arbitrators, or they were guilty of certain misconduct or they exceeded or imperfectly executed their powers in certain respects specified.

Resubmission may be directed in such a case, if the time limited for the award has not expired. The award may be modified or corrected for an evident material miscalculation or mistake in description, or where the arbitrators have awarded on a matter not submitted to them but not affecting the merits of the decision on the matters submitted, or where the award is imperfect in form without affecting the merits of the controversy. Proceedings to confirm are to be brought within one year after the award is made; to vacate, modify or correct within three months after it is delivered. The proceeding is commenced by an application to be served on the adverse party or his attorney as though it were service of a notice of motion in the same court. If he is a non-resident, it is to be served by the marshal of any district within which the adverse party is found, in like manner as other process of the court. A stay of proceedings to enforce the award pending the determination of a motion to vacate, modify or correct is provided. The papers to be filed with the order granted on such applications are specified.

The judgment is to be docketed as though rendered in an action and has the same force and effect and is subject to the same provisions of law as judgments in an action. Hence it may be enforced like an ordinary judgment.

LEGAL JUSTIFICATION

By the Constitution of the United States Congress is given power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and "to constitute tribunals inferior to the Supreme Court." (Art. I, sec. 8.) "The judicial power of the United States shall be vested in such inferior courts as the Congress may from time to time ordain and establish" and extends "to all cases in law and equity arising under this Constitution, the laws of the United States," and "to all cases of admiralty and maritime juris-

diction." (Art. III, secs. 1 and 2.) Congress is given authority to make all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government or any department or officer thereof. (Art. I, sec. 8.) Powers not delegated to the United States are reserved to the States. (Tenth amendment.)

It does not seem that the law depends for its validity solely on the exercise of the interstate commerce and admiralty powers of Congress. The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts they are clearly within the congressional power. This principle is so evident and so firmly established that it can not be seriously disputed.

A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.

That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts. (*U. S. Asphalt R. Co. v. Trinidad Lake P. Co.*, 222 Fed. 1006; *Aktieselskabet K. F. K. v. Rederiaktiebolaget Atlanten*, 232 Fed. 403, affirmed with opinion; 250 Fed. 935; affirmed by United States Supreme Court with opinion, March 22, 1920; *The Eros*, 241 Fed. 186; *Meacham v. Jamestown F. & C. R. R. Co.*, 211 N. Y. 346; *Benson v*

Eastern B. & L. Association, 175 N. Y. 83; D. & H. Canal Co., *v* Penn Coal Co., 50 N. Y. 250, 259.)

The rule is succinctly stated in the Meacham case, *supra*; "An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

Neither is it true that such a statute, when it declares, arbitration agreements to be valid, declares their existence as a matter of substantive law. The courts have always recognized that such agreements have existed but have refused to enforce them. It was often said loosely that arbitration agreements were void, even under the common-law rule. This statement was not accurate. While the courts refused to enforce arbitration agreements specifically, they recognized their existence because they gave another remedy. From the earliest times it was held that for a breach of arbitration agreement the aggrieved party was entitled to damages. (*Hamilton v Home Ins. Co.*, 137 U. S. 370, 385; *Miller v Canal Co.*, 41 N. Y. 98; *Union Ins. Co., v Central Trust Co.*, 167 N. Y. 633; *Haggart v Morgan*, 5 N. Y. 422, 427; *Finucane Co. v Board of Education*, 190 N. Y. 76, 83.)

In no proper sense, therefore, was the arbitration agreement void. It was valid in the same sense that most contracts are valid, i. e., while specific performance would not be given, a remedy for a breach existed in the right to recover damages.

So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforceable even by the State courts. In both cases the Federal power is supreme. Congress may act

as its will, and having acted, no law or regulation of a State inconsistent with the congressional act can be given any force or effect even in the courts of the State itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature. This rule is so well settled that it is no longer subject to question or discussion. It has been enforced in innumerable instances. (*Northern Securities Co. v. U. S.*, 193 U. S. 197, 333.)

It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said to affect it. Contracts relating to interstate commerce are within the regulatory powers of Congress. (*Board of Trade v. Olsen*, U. S. S. C. Adv. Op. No. 13, May 1, 1923, p. 519; *American Express Co. v. Iowa*, 196 U. S. 133, 143.)

The only questions which apparently can be raised in this connection are whether the failure to enforce an agreement for arbitration imposes such a direct burden upon interstate commerce as seriously to hamper it or whether the enforcement of such a clause is of material benefit. If either of these questions can be answered in the affirmative, we believe it to be beyond question that Congress can legislate concerning the matter.

Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, the present statute is not materially affected. The primary purpose of the statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.

PUBLIC POLICY

It must not be felt that the adoption of arbitration as a substitute for proceedings at law is a novelty, the success of which is uncertain. Despite the apparent hostility of the courts, the remedy has had a sufficient trial to prove its worth. As a matter of fact, the hostility of the courts in recent years was more apparent than real and was due to an adherence to precedent. There are plenty of expressions throughout the reports, showing that the courts favored arbitration but felt themselves unable to enforce it without legislative consent. (*D. & H. Canal Co. v. Penn Coal Co.*, 50 N. Y. 250; *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006.) The root of the rule declaring that agreements to arbitrate were unenforceable is found many centuries removed from the present day, in a time when there existed a real jealousy on the part of the courts for their jurisdiction and the rule became so firmly established that no court felt itself at liberty to disregard it.

Nevertheless, in many of our states and for a long time procedure has been provided by which a dispute, *after* it has arisen, might be submitted to arbitration, and in 1920 the first statute validating agreements to submit disputes to arbitration in anticipation of their arising was adopted by the State of New York. (Chapter 275, Laws of 1920, New York). This was followed by a statute in similar form in New Jersey (Chapter 134, Laws of 1923, New Jersey). The experience of disputants under those two statutes has been so satisfactory that the system is spreading rapidly and gaining remarkable popularity.

The evils at which arbitration agreements in general are directed are three in number:

1. The delay incident to a proceeding in our courts, which in centers of commercial activity where there exists congestion of the court calendars, frequently amounts to several years. Contributing to this delay are

the preliminary motions and other steps which litigants may take and the appeals which are open to them.

2. The expense of litigation.

3. The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not fit all specific cases, or because the judge or the jury is not and cannot be made familiar with the peculiarities of the given controversy. A judgment by men particularly experienced in the given field is one of the greatest advantages of arbitration.

From our summary of the provisions of the Federal law, it will appear how thoroughly delay has been excised from the settlement of disputes. There are no technical pleadings to be drawn and settled, no multiplicity of motions to be decided, and only the very briefest delay in the decision of the preliminary matter, where and how the arbitration shall proceed. Probably the great majority of arbitrations are decided at one hearing and the award is made within two or three days after the matter is submitted to the arbitrators. If the party against whom the award is rendered refuses to perform it, the matter of its confirmation again takes only a few days, since it is treated as a motion before the court; and while the right of appeal from the judgment entered on the confirmation is preserved, the grounds of appeal are so circumscribed that few appeals can be taken.

THE PROPOSED STATE STATUTE

At the 1924 meeting of the American Bar Association at Philadelphia, the National Conference of Commissioners on Uniform State Laws reported a model state statute. Its consideration was postponed for a year. *This bill does not make contracts for arbitration valid, irrevocable and enforceable.* It leaves the status quo in all the states, except that *submissions* of existing contro-

versies to arbitration are no longer to be revocable. It fails to protect the constitutional right of trial by jury where the contract of arbitration is itself put in issue. The committee of the Commissioners in charge reported to the Commissioners as follows:

It is the belief of the Committee that the law as it now exists in New York and New Jersey may be very acceptable in those States because each of them have to do with a very large element composed of importers and there is a very large field of litigation in connection with residents of foreign countries or states. It is felt that this situation does not prevail in the rest of the United States, and that it would be inadvisable at this time to attempt to report out an act that would not be acceptable in most of the States of the Union. For that reason, your Committee felt that it was better at this time to recommend to the Conference the passage of a law which would permit two or more parties to agree in writing to submit to arbitration any controversy existing between them at the time the agreement to submit to arbitration is entered into.

But now that the business men of the country have made the principle national in scope, and Congress has adopted it unanimously, we may forget the implications in the report by the committee to the Commissioners, and try to harmonize the state laws to meet it.

For how can the legislative situation be uniform in the States, if there is a different policy in the case of contracts involving *intrastate* commerce from that now made national in the case of contracts involving *interstate* commerce? And why should merchants whose claims being under \$3,000 must apply to state courts for relief, meet a situation where, if the claim is against a non-resident and involves interstate commerce, the contract for arbitration is *valid*; but, though it be \$10,000, if it be against a fellow resident or involve only intrastate commerce, it is invalid and revocable? It is precisely such situations which require uniformity. May we anticipate that the action of the Commissioners last year in the light of this Federal legislation will be res-

cinded and a recommendation made by them in line with the recommendations of our committee in 1922, to the end that the State law shall be put in harmony with the United States law?

THE EVILS TO BE CORRECTED¹

The evils which arbitration is intended to correct are three in number: (1) The long delay usually incident to a proceeding at law, in equity or in admiralty, especially in recent years in centers of commercial activity, where there has arisen great congestion of the court calendars. This delay arises not only from congestion of the calendars, which necessitates each case awaiting its turn for consideration, but also frequently from preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, and appeals from decisions upon the merits which commonly follow the decision of any case of real importance. (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, or because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy.

Making an agreement to arbitrate is not always sufficient, however. If both parties are strictly honorable, and if there is no misunderstanding between them as to the scope and effect of the agreement which they have made, they will carry out the contract to arbitrate and perform the award entered upon it, and there is no necessity for a statute. Unfortunately, this situation does not commonly exist. The party refusing to proceed may

¹ From "The New Federal Arbitration Law," by Julius Henry Cohen and Kenneth Dayton. *Virginia Law Review*. 12: 5. February, 1926.

believe in good faith that for one reason or another his agreement to arbitrate does not bind him (*i.e.*, he may assert that he made no such agreement or that it was not intended to cover the particular controversy). Even without this, after a dispute has arisen, one party or the other ordinarily has a certain technical advantage which may be impaired if he submits the controversy to arbitration rather than to the courts. It may be in the application of a settled rule of law. It may be in some procedural peculiarity, or it may be merely in the delay of which he is assured by the congestion of the courts before he has to meet his obligation. The result is that this party is usually loath to surrender his supposed advantage. His unwillingness is not necessarily due to dishonesty or bad faith. Unfortunately, business has become so used to the doctrine of revocability of arbitration agreements that these clauses are not regarded in the same light as other contractual obligations, and the party who refuses to perform his agreement frequently does not realize that he is violating his plighted word. He has no conscious intention of defaulting upon his agreement, but the rule of law has blinded him to the fact that this is an agreement. While our American courts have usually declared a friendly attitude toward arbitration, they have felt themselves bound by the long standing decisions holding that arbitration agreements were revocable at will and would not be enforced by the courts. The result has been that any party who wished to avoid an agreement which he had made to arbitrate had only to declare his refusal to proceed and the courts would not order specific performance of the contract while the alternative of a damage suit was inadequate.

Furthermore, after the completion of an arbitration proceeding and the rendition of an award, the remedy open to the successful party if his opponent refused to perform the award was not in all respects satisfactory. To be sure, the award was usually considered a determination of the merits of the controversy, and the suc-

cessful party had only to plead and prove the award to recover judgment upon it. Even this remedy, however, left room for an extended law suit because of the collateral issues of fraud and misconduct and other impropriety in the proceeding which might be introduced and which meant that the delay in finally recovering judgment was substantially as great as though action had been brought upon the original dispute. The one advantage lay in the fact that proof became simpler.

THE REMEDY—OPERATION OF THE STATUTE

To meet the situation where, through dishonesty or mistake or otherwise, one party to an arbitration agreement refuses to perform it, statutes such as those adopted by Congress and in New York and New Jersey are advocated and have met favor.

The adoption of the statute does not mean that parties who have agreed to arbitrate and, after the controversy arises, are still willing to arbitrate and abide by the results must come into court or submit to any interference whatever. The arbitration proceeds as though the statute were non-existent. There is no interference by the courts.

Where one party refuses to carry out the agreement, however, the other party now has a remedy formerly denied him. This remedy is not, as has been suggested, equally cumbersome with the existing actions at law, nor is there any prospect that it will ever become so.

At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim. Such examination is, however, made summarily, so that there is a minimum of delay and expense.

The procedure for the enforcement of arbitration agreements is very simple. It reduces technicality and

formality to a minimum. It follows the same course as do ordinary motions before the given District Court. Reasonable notice to the adverse party is assured by the requirement that notice of the application be served as though it were summary process. Thereafter, however, except in the case where the existence and applicability of the arbitration agreement are in dispute, the question whether arbitration should be ordered is decided upon motion papers, affidavits and such exhibits as the party chooses to submit, obviating the necessity of appearance in court, together with the calling of witnesses and the opportunity for other preliminary motions and proceedings. The whole matter should be disposed of within a few days after the application is made.

The court then enters an order directing that the arbitration shall proceed. The hearing must be within the Federal district within which the petition has been filed. If the arbitrators are named in the agreement or a method for their appointment is provided, this is followed. If, for any reason, there is a lapse in the naming of arbitrators, the court corrects this by an appointment of its own.

Thereafter the arbitration again proceeds without any formality and without interference from the court. All technicalities of legal procedure and requirements are removed. Except for the few days' delay while the court is deciding whether an order should be entered, the matter stands as though no recourse to court ever had been had. The arbitrators are given powers to call witnesses and require the production of papers, to assure that a full and fair consideration of controversy may be had despite the possible recalcitrance of one or more parties to the dispute.

The award having been made, procedure to enforce it also is simplified. Lacking the statute, the only recourse of the successful party was to sue in a court of law upon the award. It is true that he was relieved from proof concerning the merits of the original controversy

and possible defeat upon technical grounds, but he was nevertheless subject to the delay always incident to any action at law and to defeat in proving the award itself.

Under the statute, if the award is not voluntarily performed, it *must* be entered as a judgment of the court, upon motion to confirm, unless grounds exist for its vacation, correction, or modification. Here again there need be a delay only of a few days between the time of application for its entry as a judgment—which may follow immediately upon the award—and its actual entry, and upon its entry it takes status as any other judgment, subject to execution and enforcement.

The motion to confirm may be opposed or an independent motion may be made to vacate, modify, or correct the award. There is no opportunity for vacation upon a technical ground. The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

As to modification and correction, the grounds are equally limited. Obvious miscalculations and mistakes are to be corrected. Where the arbitrators have awarded upon a matter not submitted to them, the award may be modified. Where the award is imperfect in form but does not affect the merits of the controversy there may be correction or modification. Correction or modification is so to be made as to effect the intent of the award and to promote justice. The fairness and necessity of these provisions are so obvious as to need no argument, and in no case do they act as a bar to informal and expert determination of the matter.

In all these proceedings there is no material expense or delay and no opportunity for technical procedure.

When the award has been entered as a judgment, of course, an appeal may be taken as from an ordinary judgment in an action, and similarly an appeal may be taken from an order vacating, modifying, or correcting the award though the statute does not specifically prescribe this. Any expectation that such appeals might result practically in restoring the technicality and delay of legal procedure, has been removed by experience. In the first place, the grounds of the appeal are necessarily limited to those allowed for vacating, modifying, or correcting an award. This by itself removes the vast majority of questions with which appeals are usually concerned. Despite the refusal of the courts to enforce arbitration agreements, they have been equally consistent in their refusal to upset the awards given by arbitrators when arbitration has taken place. This insistence that the arbitrators' award should be accepted—the known hostility of the courts to its impeachment—necessarily discourages an appeal. It tends to assure that appeals will be taken only when the party is convinced in good faith that he has a meritorious ground of complaint.

On the other hand, obviously it would be unjust to deny the right of appeal altogether. If arbitrators' awards are subject to mistakes and other human frailties, as necessarily they must be, it is obvious that review solely by a judge sitting at a motion term will not suffice to safeguard the party whose rights have been substantially violated by the arbitrators. The judge may misinterpret the law; he may misunderstand the case; he may, in exceptional occasions, be subject to the same improper influence as the arbitrators. To deny any right of appeal at all would be to take away a most important privilege and safeguard without a compensating gain.

Nor does this result in delays which are not at present experienced. As has been previously pointed out, at present, without the aid of the statute, an action must

be brought in the courts upon the award. This delay is obviated by the statute. If a judgment was entered upon the award against a party, then that party always has had the right to appeal, as from any other judgment, and the grounds of the appeal have, of course, been those in any such proceeding. There was no limitation as there is under this system. The statute does not, therefore, add a new field of delay, but, on the contrary, materially narrows the existing one.

THE NEW YORK ARBITRATION ACT

Chapter 275, Laws of 1920, in effect April 19, 1920

ARTICLE I.

Short Title

SECTION 1. *Short Title.* This chapter shall be known as the "Arbitration Law."

ARTICLE 2.

General Provisions

SECTION 2. *Validity of arbitration agreements.* A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title 8 of chapter 17 of the code of civil procedure, or article 83 (now 84) of the Civil Practice Act, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

SECTION 3. *Remedy in case of default.* A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for personal service of a summons. The court, or a judge thereof, shall hear the parties, and upon

being satisfied that the making of the contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. If the jury find that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury find that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court or the judge thereof, shall make an order summarily directing the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof.

SECTION 4. *Provision in case of failure to name arbitrator or umpire.* If, in the contract for arbitration or in the submission, described in section 2, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

SECTION 5. *Stay of proceedings brought in violation of an*

arbitration agreement or submission. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section 2, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section 2, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

SECTION 6. *Applications to be heard as motions.* Any application to the court or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

ARTICLE 3.

NOTE: This article amends certain sections of the Code of Civil Procedure and repeals other provisions thereof and provides that the provisions of the Civil Practice Act regarding arbitration shall apply to arbitrations under this Act.

The provisions of the Civil Practice Act now in force follow:

Civil Practice Act (Art. 84) Arbitration

SECTION 1448. *Submission to arbitration.* Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action.

A submission of a controversy to arbitration cannot be made, either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section,

the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenant or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

SECTION 1449. *Contents of submission.* A submission authorized by the last section shall be in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded. The submission may provide that a judgment of a specified court of record shall be rendered upon the award made pursuant to the submission. If the supreme court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county.

SECTION 1450. *Appointment of additional arbitrator or umpire.* Where a submission is made as prescribed in this article, an additional arbitrator or an umpire cannot be selected or appointed unless the submission expressly so provides. Where a submission made, either as prescribed in this article or otherwise provides that two or more arbitrators therein designated may select or appoint a person as an additional arbitrator, or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission or by the subsequent written consent of the parties or their attorneys.

SECTION 1451. *Hearings by arbitrators.* Subject to the terms of the submission, if any are specified therein, the arbitrators selected as prescribed in this article must appoint a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time upon the application of either party for good cause shown or upon their own motion, but not beyond the day fixed in the submission for rendering their award, unless the time

so fixed is extended by the written consent of the parties to the submission or their attorneys.

SECTION 1452. *Oath of arbitrators.* Before hearing any testimony, arbitrators selected either as prescribed in this article or otherwise must be sworn, by an officer authorized by the law to administer an oath, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding, unless the oath is waived by the written consent of the parties to the submission or their attorneys.

SECTION 1453. *Power of arbitrators.* The arbitrators selected either as prescribed in this article or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers with respect to all the proceedings before them which are conferred upon a board or a member of a board authorized by law to hear testimony. All the arbitrators selected as prescribed in this article must meet together and hear all the allegations and proofs of the parties; but an award by a majority of them is valid unless the concurrence of all is expressly required in the submission.

SECTION 1454. *Fees and expenses of arbitrators.* Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the supreme court; and also their expenses.

SECTION 1455. *Requirements as to award.* To entitle the award to be enforced, as prescribed in this article, it must be in writing; and, within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified, in like manner as a deed to be recorded; and either filed in the office of the clerk of the court in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties or his attorney.

SECTION 1456. *Motion to confirm award.* At any time within one year after the award is made, as prescribed in the last section, any party to the submission may apply to the court specified in the submission for an order confirming the award; and thereupon the court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the

next two sections. Notice of the motion must be served upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the supreme court, the motion must be made within the judicial district embracing the county where the judgment is to be entered.

SECTION 1457. *Motion to vacate award.* In either of the following cases, the court specified in the submission must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

Where an award is vacated, and the time within which the submission requires the award to be made has not expired, the court, in its discretion, may direct a rehearing by the arbitrators.

SECTION 1458. *Motion to modify or correct award.* In either of the following cases, the court specified in the submission must make an order modifying or correcting the award, upon the application of either party to the submission:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award.

2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.

3. Where the award is imperfect in a matter of form not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to affect the intent thereof and promote justice between the parties.

SECTION 1459. *Notice of motion and stay.* Notice of a motion to vacate, modify or correct an award must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion upon an attorney in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

SECTION 1460. *Costs on vacating award.* Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements may be awarded to the prevailing party; and the payment thereof may be enforced in like manner as the payment of costs upon a motion in an action.

SECTION 1461. *Entry of judgment on award and costs.* Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this article. Costs of the application and of the proceedings subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court in its discretion. If awarded, the amount thereof must be included in the judgment.

SECTION 1462. *Judgment-roll.* Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire, and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award and a copy of each order of the court upon such an application.

4. A copy of the judgment.

The judgment may be docketed as if it was rendered in an action.

SECTION 1463. *Effect of judgment and enforcement.* The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

SECTION 1464. *Appeals.* An appeal may be taken from an order vacating an award or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon and the enforcement of the judgment, are governed by the provisions (of statute and rule regulating appeals in actions) as far as they are applicable.

SECTION 1465. *Death or incompetency of party.* Where a party dies (after making a submission either as prescribed in this article or otherwise), if the submission contains a stipulation authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party (to a submission) is appointed, the award may be confirmed, vacated, modified or corrected, upon the application of or notice to, a committee of the property, but not otherwise. In a case specified in this section, a judge of the court may make an order extending the time within which notice of a motion to vacate, modify or correct the award must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same as where a party dies after a verdict.

SECTION 1466 to 1468 repealed.

SECTION 1469. *Application of this article.* This article does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this article or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this article does not affect a submission made otherwise

than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

NOTE: Under Chapter 341 of the Laws of 1923, enacted May 21, 1923, the following amendment to the arbitration act permits the courts to grant an open commission to take the testimony of non-resident witnesses, as in any other special proceeding:

SECTION 6-a. *Arbitration a special proceeding.* Arbitration of a controversy under a contract or submission described in section two shall be deemed a special proceeding, of which the court specified in the contract or agreement of submission, or if none be specified, the supreme court, shall have the like jurisdiction, for all purposes, as of a submission pursuant to article eighty-four of the civil practice act.

THE LAW OF COMMERCIAL ARBITRATION AND THE NEW YORK STATUTE²

The decision of the New York Court of Appeals in the *Berkovitz* case³ furnishes an opportunity for a reminder of the present legal status of commercial arbitration in this country and an outline of the steps yet to be taken to modernize the law upon this subject. For over three hundred years a dictum of Lord Coke has held sway over the legal minds of America. It is now on its fair way to decent burial. No movement in recent times has done more to bring the Bar and commerce into closer relation than the co-operative work of the past five years between the Chamber of Commerce of the State of New York and the New York State Bar Association. And now the American Bar Association, through its Committee on Commerce, Trade and Commercial Law, is taking up the work of nationalizing the movement.

Having been persuaded that American judges had been inadvertently led into following an obsolete theory

² By Julius Henry Cohen. *Yale Law Journal*. 31: 147. December, 1921. Reprinted here by permission.

³ *Matter of Berkovitz vs. Arbib & Houlberg*. 1921. 230 N.Y., 261, 130 N.E. 288.

of the law, the New York Chamber of Commerce was of opinion that the presentation of the more modern doctrine of the English courts would result in the correction of the judicial error in this country, as it had already been corrected in England by the English judges themselves. Accordingly, the Chamber had prepared to ask leave to interevene in such cases as would present the subject for reconsideration by the courts and had prepared a review of the authorities upon the subject.⁴

In 1914 the Bar Association of the State of New York created a committee known as the Committee on the Prevention of Unnecessary Litigation. At the 1916 session of the Association the Committee was authorized to negotiate with the Chamber of Commerce for the adoption of "Rules for the Prevention of Unnecessary Litigation," among which, under the heading, "Prevention of Litigation After the Facts Become Fixed and Before Suit," the Committee included:⁵

After the facts upon which a dispute can be based have become fixed, either before or after a dispute has arisen, it is possible to do much to prevent litigation. What can best be done in each case, and whether with or without legal advice, necessarily depends upon the facts and the parties to the prospective controversy. Differences may be minimized, adjusted or arbitrated. If not so disposed of litigation will usually ensue.

* * *

Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the Code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association.

The experiences of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful.

⁴ See Cohen, *Commercial Arbitration and the Law*. 1918.

⁵ 40 *Proceedings of New York State Bar Association*. 1917. 387, 389, 390.

At the Conference of Bar Association Delegates held in Cleveland in 1918, resolutions were adopted urging that in the interest of preventing unnecessary litigation the Bar should encourage the settlement of disputes out of court by arbitration as far as practicable.

The Committee on the Prevention of Unnecessary Litigation became the Committee on Arbitration of the New York State Bar Association. In its report of January, 1919,⁶ that committee announced that it had become convinced "that the doctrine of revocability of such agreements is a legal anachronism which *should be eliminated from the law at the earliest moment* and should induce the courts to reverse their former rulings as the wisest method of correcting a judicial error of long standing." In that year the Committee submitted a proposed bill for the recognition and enforcement of agreements for the arbitration of controversies.

In 1920 three committees of the New York State Bar Association combined with the Committee on Arbitration of the New York Chamber of Commerce in the drafting of the statute, now the Arbitration Law of the State of New York.⁷ The Committee on Law Reform said:⁸

The demands of international commerce dictate that this nation should not be behind others, either in honesty or in the facilitation of contracts containing agreements for arbitration of disputes. The jealousy of judicial jurisdiction has led to a historical attitude of the Courts toward arbitration agreements, which is unintelligible at present to the business man. The subject has been the basis of a remonstrance from the London Chamber of Commerce to the Chamber of Commerce of the State of New York. In this day, it does not seem that any good public purpose is subserved by treating arbitration clauses as nullities and unenforceable.

The Committee to Act upon Recommendations of the Conference of Bar Associations said:⁹

⁶ 42 *Ibid.* 1919. 93.

⁷ Laws, 1920, ch. 275.

⁸ 43 *Proceedings of New York State Bar Association.* 1920. 282.

⁹ *Ibid.* 127, 128.

The chairman¹⁰ believes that the courts should be given opportunity to correct their error before relief is secured by legislation. His colleagues upon this Committee share with him the view that while it is desirable that judicial error should be judicially corrected, and that resort to legislation should, as a matter of general policy, not be had in such matters, and while they do not wish to discourage the efforts of the Chamber of Commerce, they are nevertheless of opinion that if the great State of New York is to be the international commercial center it aspires to be, it must speedily set its house in order and not wait for the slow and tedious process of judicial correction of judicial error to be applied in this field. It must promptly simplify its judicial procedure and must make available to business men the easy methods of commercial arbitration. The anomalous situation now existing in the difference between the law in all other parts of the civilized world and the law in our own State should not be permitted to continue. Only in our own country is an agreement to arbitrate differences treated as something against public policy, as a contract less sacred and binding than other commercial agreements. For these reasons your Committee has conferred with the Committee on Arbitration of the New York State Bar Association and with the chairman of the Committee on Law Reform, and members of all three committees have joined in the draft of the proposed Act. . . . *This Act,¹¹ in the opinion of your Committee, will tend to put the State of New York in the lead in the matter of recognition of arbitration provisions of ordinary commercial contracts and provide a simple method for safeguarding the machinery of commercial arbitration.*

The statute does not merely validate and make enforceable and irrevocable agreements for arbitration. The act recognizes that the infirmities, common to all contracts, which furnish ground for revocation at law or in equity, may still exist in cases of arbitration agreements. Next, if there be any dispute regarding the making of the contract or submissions, or if the existence of a dispute is denied, a trial of that issue by the court, with a jury, if it is desired by either party, and without, if it

¹⁰ The writer of this article.

¹¹ The present arbitration law, *see* note 7 *supra*.

it is not, is preserved. The sections of the New York Code of Civil Procedure relating to the conduct of submissions are retained, so that if an award is made, based upon an incomplete submission, or affected by fraud, corruption, partiality, mistake, or any similar misconduct, or if the arbitrators have exceeded their jurisdiction or made an imperfect award, the award may be vacated or modified as the circumstances dictate. The award may then be enforced as a judgment, and as such, an appeal may be taken from it. And, similarly, from an order vacating an award the right of appeal is preserved.

In other words, the rights of both parties are reasonably safeguarded, and no common-law or constitutional right to a jury trial or to the protection of the courts is taken from them, except so far as by their express agreement they themselves have provided that the arbitrators, instead of court and jury or court without jury, shall pass upon certain questions of fact better suited for decision by them than by strangers to the customs and practices of the trade.

The statute does not merely correct and modernize the rule. It does not merely make the law of New York State conform to the public policy now prevailing throughout the world. It establishes legal machinery for protecting, safeguarding and supervising commercial arbitration. Instead of narrowing the jurisdiction of the Supreme Court it broadens it. It adds to its equity powers. It preserves the right of trial by jury where it should be preserved, and leaves the parties free to waive the jury trial, where they care to waive it.

Presumably men of commercial experience today need no guardianship for determining, at the time of making a contract, whether they prefer the opinion of their own trade upon technical questions, or the hazardous judgment of a jury of the vicinage. They know whether the contract is of a kind under which disputes can better be disposed of by trade committees or by twelve inexperienced strangers to the trade. They know whether or not

they prefer to have judicial selection of arbitrators, and the statute leaves them free either to provide their own method for selection or to leave it to the court.

Thus two practical results are accomplished. The courts are relieved of the burdensome technical trade questions which heretofore have been decided by juries, advised by the very experts, as witnesses, who are now selected by the parties to dispose of the issue. By one movement there is removed the expensive and time-consuming process of determining simple questions of trade customs and trade facts. Questions of damages involving consideration of market values are likewise disposed of on the basis of trade experiences. On the other hand, the supervision of arbitration by the court is preserved. Instead of being ousted of jurisdiction over arbitrations, the courts are given jurisdiction over them, and where fraud, palpable mistake, or failure to consider the evidence in the case is presented, the party aggrieved has his ready recourse to the courts. In short, if the parties believe that the waiving of technical objections to the admission of evidence and of a jury trial are in their interest, they may so waive them by entering into an arbitration agreement. And why shouldn't they? Litigation naturally involves friction, the breaking up of former friendly relations, either with the bringing of the suit or in the trial. In many instances it is necessary. But merchants and trade subsist on the continuity of friendly relations in spite of occasional controversy. Business men know that in spite of all effort differences will arise—honest differences which may either promote friction, heat, engender passion, and arouse the worst feelings on the part of the persons involved, turning a small blaze into a conflagration, or may be disposed of as matter of trade routine with no injury to pride or conscience. No wonder that sensible merchants seek a legal method which will enable honest men to settle their differences without friction and the breach of trade relations. As was said by Lord Stair, in 1693,

Nothing is more prejudicial to trade than to be easily involved in pleas, which diverts merchants from their trade, and frequently mars their gain and sometimes their credit.¹²

Lord Kenyon said, in 1788, in *Halfhide v. Fenning*:¹³

Such references are very advantageous to the parties; as arbitrators are more competent to the settling of complicated accounts than the officers of courts of law or equity.

Lord Eldon, in 1808, in *Waters v. Taylor*¹⁴ referred to litigation of the parties as "calling down upon them an interposition, perhaps not the most ruinous, but that cannot take place without infinite mischief to all, who may have any interest in the subject," and so "I shall give them an opportunity to pause, and consider, whether they will press for my determination, or have their disputes determined by"—note the language here—"that more wholesome mode, which they have themselves provided."¹⁵

Lord Campbell, writing the majority opinion in *Scott v. Avery*,¹⁶ said:

It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract. . . . Public policy, therefore, seems . . . to require that effect should be given to the contract.¹⁷

And now Judge Cardozo, writing the unanimous opinion of the Court of Appeals, says:¹⁸

¹² Mackenzie vs. Garvan 3 Sess. Cas. (2d series) 318, 323.

¹³ 2 Brown's Ch. 336, 337.

¹⁴ 15 Ves. Jr. 10, 20.

¹⁵ Lord Chancellor Cranworth in *Drew vs. Drew* (1855, H.L.) 2 Macq. Rep 1, 4, spoke of the rule of unenforceability as "an inconvenient, and, I think I may be allowed to say, an irrational state of the law, which has since been rectified. . . ."

¹⁶ (1855) 5 H.L.C. 811, 851.

¹⁷ And even Coleridge, who dissented from the decision of that case, admits that he certainly is "not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals." *Ibid.* 843.

¹⁸ *Matter of Berkovitz vs. Arbib & Houlberg* (1921) 230 N.Y. 261, 276, 130 N.E. 288, 292. See also *White Eagle Laundry Co., vs. Slawek* (1921) 296 Ill. 241, 129 N.E. 753, where a statute (Hurd's Ill. Rev. Sts. 1919. ch. 10), similar to the New York Law, was upheld. In another recent case,

We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. *The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do.* They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation. (Italics ours.)

It is no exaggeration to say that at the present moment commerce and trade are passing through one of the greatest crises in their history, and, as the Federal Reserve Bank is acting as a stabilizer for money conditions, existing systems of commercial arbitration are acting as stabilizers of commercial relations. That arbitration clauses are now legally enforceable in New York is a strong inducement toward adjusting trade difficulties out of court and thus preserving the good relations between the parties, while securing a fair and reasonable adjustment of the controversy in hand. This is the public policy behind the statute, and its efficacy as a preventive of unnecessary and burdensome litigation is as demonstrable as that sanitation is a preventive of disease.

a Federal District Court refused to apply the New York Statute and held in arbitration agreement unenforceable. The decision, however, appears to rest entirely upon the authority of previous cases in higher Federal courts. Judge Mack recognizes in his opinion that the modern tendency is in accord with the New York and Illinois Statutes. See *Atlantic Fruit Co. vs. Red Cross Line* (Sept. 24, 1921) U.S. D.C. S.D. N.Y., *New York Law Journal*, October 20.

The source of the common-law doctrine of the revocability of arbitration agreements is to be found in *Vynior's Case*.¹⁹

It is clear from a study of the authorities of this period that the reason agreements for arbitration were, in the opinion of the judges, revocable, was a mistaken idea of the nature of the arbitrator's authority. Chief Justice Coke in *Vynior's Case*, and the judges and commentators who followed him, treated the authority of an arbitrator as that of an agent, which clearly it is not. An agent receives his power from an individual, and without consideration. From those circumstances alone is the authority revocable at the principal's will. But when two parties of opposing interest mutually agree that a third person shall have power by his decision to bind each of them, the elements of a bilateral contract exist, and there is a consideration running to each for the irrevocability of the arbitrator's power. As between the parties he is no longer a simple agent. His authority represents the promise of each to the other, and is no more to be revoked at will than any other term of a bilateral agreement.²⁰ But the elements of simple contracts and rights conferred thereby were not clear to Elizabethan jurists, nor were the doctrines of agency beyond their earliest infancy. Into this cloud of misunderstanding and reverence of precedent came the great authority of Coke, and by an ill-considered dictum was fixed the rule that an arbitrator's authority was revocable.

But even in Coke's time the judges did not say that the arbitration agreement was in every sense *void*. For in *Vynior's Case* a bond had been entered into conditioned upon the performance of the arbitration, and while the defendant was considered to have the *power* to revoke the arbitrator's authority, yet by so doing *he broke his agreement* and forfeited the bond, hence the plaintiff was allowed to recover thereon. *In other words, a remedy*

¹⁹ (1609, K.B.) 4 Coke, 302. The law as it stood after that decision is best stated in March, *Actions on Slander and Arbitraments* (1648).

²⁰ *Collins vs. Oliver* (1844, Tenn.) 4 Humph. 439, 440.

was given upon the contract. It was not in form an action for breach of the agreement. That was not yet permitted. Plaintiffs must shape their causes to an assumpsit still founded on an action on the case, or else sue in debt upon the obligation of a bond. But the result and the intention were the same—to recompense the obligee for the obligor's default—to give him a remedy for the breach of the agreement. This remedy may be presumed to have been adequate, for if the legal adviser of those days were wise, he put the penalty in such sum as would cover his client in case of the withdrawal of the other party from the arbitration. But this, of course, was before fines and penalties were abolished. When they were prohibited,²¹ it then left the aggrieved party with a *remedy*, it is true, namely, an action for damages for the breach of the covenant to arbitrate, a remedy which, as we know, survives to this day, but a remedy which, from a practical viewpoint, that is the establishment of damages, was inadequate. As Fletcher Moulton says in *Doleman & Sons v. Ossett Corporation*.²²

It will be evident, however, that the remedy in damages must be an ineffective remedy in cases where the arbitration had not been actually entered into, for it would seem difficult to prove any damages other than nominal.

As time went on and the notions of simple contract and its effect became clearer to the English judges, the fallacy in the rule of *Vynior's Case* appeared to them. It was at this time that the doctrine of *ouster of the court's jurisdiction* was evolved. The origin of that rule lies in *Kill v. Hollister*.²³ The case is reported in eleven lines, and the rule is put forth upon no authority whatever and without discussion. But it was first stated at a period when the struggle between the various courts for the extension of their jurisdiction was still rife, and

²¹ See Cohen, *op. cit.* ch. 12.

²² [1912, C.A.] 3 K.B. 257, 268; see also Cohen, *op. cit.* 151.

²³ (1746, K.B.) 1 Wils. 129.

the bitter feeling engendered by the struggle of Coke and Bacon was not yet settled.

The rule was not immediately accepted as a determining precedent. In *Halfhide v. Fenning*,²⁴ Lord Kenyon held good the defendant's plea that, by the articles of copartnership between the parties, all differences which might arise were to be referred to arbitration and that the matter in dispute had not been so referred.

Almost immediately thereafter, in *Mitchell v. Harris*²⁵ the doctrine of *Kill v. Hollister*, *supra*, was dragged from its resting place in the old reports and quoted as a determining authority, and upon it a plea, based upon an agreement to arbitrate, was held bad. And this remained the English Law until the middle of the nineteenth century.

Nevertheless, in *Dimsdale v. Robertson*²⁶ Lord Chancellor Sugden said: "I think that *Halfhide v. Fenning* is still law."

His belief was confirmed and the process of reversing the old rule was begun in the case of *Scott v. Avery*.²⁷ This was not a unanimous decision, for some of the judges preferred still to remain in line with precedent, though realizing the weakness of the reasons theretofore given for the rule. Baron Martin and Lord Coleridge were persuaded that the old basis for the rule could not be sustained even in their day and so put the rule upon the new ground of public policy. Their opinion, however, was overruled by the majority of the lords, and the law of England immediately after *Scott v. Avery* was that where a contract provided that no action should be brought between the parties until arbitrators have disposed of any dispute which might arise between them, "*there is abundant consideration for that in the mutual contract into which the parties have entered; therefore,*

²⁴ (1788) 2 Brown's Ch. 336, 337, See *supra* p. 151.

²⁵ (1793, Ch.) 2 Ves. Jr. 129.

²⁶ (1844, Ch.) 2 Jones & La Touche, 58.

²⁷ (1855) 5 H.L.C. 811.

unless there is some illegality in the contract, the courts are bound to give it effect."

This, of course, was not yet a complete reversal of the rule and amounted only to holding that an agreement that arbitration should be a condition precedent to any right of action upon the broken contract was valid. Such was the rule enunciated by the courts of New York in the case of *D. & H. Canal Co. v. Pa. Coal Co.*²⁸ The English courts, after a long struggle, however, came finally to a complete reversal of the old doctrine and, contrary to general supposition in this country, corrected the law, not because of the acts of Parliament, but as a matter of judicial development of the common law.²⁹ Our own courts, not having had brought to their attention heretofore this recent clarification of the law by the British courts, are still following English precedents long since reversed by English courts.

This result in England was not accomplished without a struggle, for, commencing with the decision of *Scott v. Avery*, two distinct lines of cases developed, one limiting it to its narrowest interpretation, the other broadening it into a rule that all agreements for arbitration were valid. Aided, no doubt, by the manifestation of public policy shown by the English Arbitration Act of 1889, the judges who supported the latter construction were finally victorious.³⁰

In *Hamlyn & Co. v. The Talisker Distillery*,³¹ the contract provided for the arbitration of any dispute which should arise out of the contract. It was held, first, that the validity of this clause should be decided according to English law, and, second, that *under the law of England such a clause is valid*. Lord Watson said:³²

The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into

²⁸ (1872) 50 N.Y. 250.

²⁹ See Cohen, op. cit. ch. 16.

³⁰ *Ibid.*

³¹ [1894, H.L.] A.C. 202.

³² *Ibid.* 211.

and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter.

Thus in England the long struggle between Coke's dictum and other precedents on the one hand and reason and experience on the other was ended. The later decisions of the English courts have only amplified further the power of the court to recognize and enforce arbitration agreements, until in *Re Arbitration between Wulff and Dreyfus & Co.*,⁸³ the English court went so far as to hold binding the submission to *counsel* of a special case originally prepared for the opinion of the court and the agreement of the parties *to accept the decision of counsel in place of that of the appellate court*.⁸⁴

In the *Stebbing case*,⁸⁵ the court went so far as to hold that arbitrators might pass upon the question whether statements made by the assured upon the basis of which the policy was issued were true. For while their falsity might avoid the policy, nevertheless, "this is a matter of difference arising out of the policy."

It must be remembered that an arbitration clause is only part of a larger contract. While in the legal sense the arbitration provision is severable, in that, though unenforceable itself, it does not avoid the rest of the contract, yet the only practical object of such clause is in its relation to the rest of the contract, providing for sale, construction, payment, etc. If any of these provisions be broken, a right of action for damages accrues thereon at once. The purpose of the arbitration clause is to provide a remedy additional to and other than the action for damages. In making the contract the parties have in mind that if a breach or a dispute arises they may

⁸³ (1917, C.A.) 117 L.T.R. 583.

⁸⁴ Among the later cases decided are the following: *Smith, Coney & Barret vs. Becker, Gray & Co.* [1916, C.A.] 2 Ch. 86; *Gray vs. Lord Ashburton* [1917, H.L.] A.C. 26; *Clements vs. County of Devon Ins. Com.* [1918, C.A.] 1 K.B. 94; *Stebbing vs. L. & L. & G. Ins. Co.* (1917, K.B.) 33 T.L.R. 395; *Clough vs. County Live Stock Ins. Assn.* (1916) 85 L.J.K.B. 1185; *Lobitas Oil Fields Ltd. vs. Admiralty Com.* (1917) 86 L.J.K.B. 1444; *Brodie vs. Cardiff Corp.* [1919, H.L.] A.C. 337; *Woodall vs. Pearl Assur. Co. Ltd.* [1919, C.A.] 1 K.B. 593.

⁸⁵ See note 34 *supra*.

go to court to enforce their rights in the usual manner, but that they do not wish to be limited to that form of remedy. They are at the time amicably disposed and have a desire not to press their legal rights against each other to the extent of litigation—they wish to preserve a general good will between themselves. Their purpose is to obtain the performance of the contract with due regard to the rights of each and with good feeling, and they recognize that often questions of a technical nature arise which only experts in their own line can properly pass upon. Therefore, they provide that in the event of dispute it shall be decided by persons of their own choosing, peculiarly fitted to deal with the facts of the trade, and that each will waive his rights to the ordinary remedies in a court of law. Obviously then, the courts are obliged to treat the matter as solely one of remedy.³⁶

At common law a right of action for damages accrued upon breach of the arbitration clause even after the abolition of fines and penalties. This right is recognized and has often been stated by the courts. Thus in *Haggart v. Morgan*³⁷ the court says:

The motion for a nonsuit was properly overruled. *First*, because the agreement to arbitrate, *only entitled the party to damages*, but was no bar to an action. (Italics ours.)³⁸

³⁶ "They (arbitration agreements) do not affect to touch the obligations of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which covers only remedies. In one sense everything which touches the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real." Learned Hand, J., in *Aktieselskabet K.F.K. vs. Rederiaktiebolaget Atlanten* (1916, S.D. N.Y.) 232 Fed. 403, 405.

So Mr. Justice Cardozo holds: "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. *Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.*" (Italics ours.) *Matter of Berkovitz vs Arbib & Houlberg* (1921) 230 N.Y. 261, 270, 130 N.E. 288, 289.

³⁷ (1851) 5 N.Y. 422, 427.

³⁸ To the same effect are: *Finucane Co. vs. Board of Education* (1907) 190 N.Y. 76, 83, 82 N.E. 737, 739; *Hamilton vs. Home Insurance Co.* (1890) 137 U.S. 370, 385, 11 Sup. Ct. 133, 138; *Doleman & Sons vs. Ossett Corp.* [1912, C.A.] 3 K.B. 256, 268.

Nor is the aggrieved party always limited merely to nominal damages. Where he has gone to expense in preparing for or executing the arbitration, before his co-party repudiates the agreement, he may recover such expense, and could, of course, recover any other damages the amount of which he could prove.³⁹

The right upon such a broken contract is, therefore, not a bare unproductive right, but in a proper case may be invoked to re-imburse the plaintiff in a substantial amount.

Section 2 of the New York Arbitration Law reads as follows:⁴⁰

Validity of arbitration agreements. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The question in the *Berkovitz* case⁴¹ was: Is this clause applicable to contracts made before the passage of the law? Even a casual reading of this section would seem to demonstrate, with all reasonable certainty, that the legislature intended that agreements for arbitration contained in contracts made before the enactment of the statute should be treated as valid, enforceable and irrevocable. The legislation provides that "a provision in a written contract to settle by arbitration a controversy thereafter arising" shall be valid. But, as to submission, they say that "a submission hereafter entered into" shall be valid. It is perfectly clear that the natural significance of the phrase "a written contract" is to include all written contracts, whether past or future. It cannot in

³⁹ This relief was actually given in: *Miller vs. Canal Co.* (1869) 41 N.Y. 98; *Union Ins. Co. vs. Central Trust Co.* (1899) 157 N.Y. 633, 52 N.E. 671.

⁴⁰ Laws, 1920, ch. 275.

⁴¹ See note 2 *supra*.

any sense be held to exclude pre-existing contracts. The sole question is whether the legislature intended to exclude them. That they did not so intend is obvious from another word used in the same clause. The section relates to a submission *hereafter* entered into. Submissions of existing disputes are contrasted with contracts for the arbitration of future controversies, and, if the enforceable submission are those *hereafter* entered into, it follows inevitably that *all* written contracts, *whether heretofore or hereafter* made, are included within the scope of the act, else an equivalent expression would have been used as to them. And so the Court of Appeals held.

The New York Law obviously was enacted to correct a pre-existing rule, and a retrospective application made for no disadvantage, created no injustice and violated no statute of limitations. Rather it made effective a promise as solemn and as sacred as the promise to pay or the promise to deliver. The parties were of full age. They weighed the benefits and the obligations of the contract they were about to make, and the benefits tipped the scales. After breach, one party claims the *right* to repudiate his pact. To support this right he calls upon a rule founded on a misunderstanding of the principles of law, strengthened by a jealousy of jurisdiction now discountenanced, continued only by respect for authority. The experience of centuries of commercial arbitration casts doubt upon his sincerity—it is the defaulting party who breaks his promise to arbitrate, the party who has most to gain by delay and technicality. The common knowledge of mankind bears out these facts. The legislature was cognizant of them.

Dowling, J., in the opinion of the Appellate Division below,⁴² based his decision upon an erroneous understanding of the law. He said, summarizing the reasons for the court's decision:

To hold otherwise, would be to attribute to the Legislature an intent to deprive one party to an agreement of his *absolute*

⁴² (1920) 193 App. Div. 423, 427.

right to terminate it at will, to give to the other party an irrevocable right where theretofore it was revocable at the will of the other party, and to create a new remedy for the enforcement of his new right. (Italics ours.)

So far as the Appellate Division based its construction upon an "absolute right to terminate" the contract at will, it was opposed to the weight and current of authority in this country.

The cases holding that no man has a vested right to break or avoid a contract into which he has entered are numerous and apply to a great variety of subjects. One of the best statements of the rule in this State is to be found in *Brearley School v. Ward*.⁴³ This case involved the construction of Section 1391 of the Code of Civil Procedure, as amended, to allow execution to issue in some cases where thitherto it had been prohibited. In *Laird v. Carton*,⁴⁴ the court construed this amendment to be retrospective in its application, upon the ground that it affected a remedy only. In the *Brearley* case, the defendant contested the constitutionality of such a retrospective application so far as it allowed execution to be levied upon part of the income from a trust fund created by a will probated prior to the enactment of the amendment. The court held that there was no merit in his defence.⁴⁵

As the court said in *Shields v. Clifton Hill Land Co.*⁴⁶

A party has no vested right in a rule of law which would give him an inequitable advantage over another, and such rule

⁴³ (1911) 201 N.Y. 358, 94 N.E. 1001.

⁴⁴ (1909) 196 N.Y. 169, 89 N.E. 822.

⁴⁵ See language of court in *Brearley* case, *supra*, 201 N.Y. 358, 363, 364, 367, 368, 371.

The court cites *Curtis vs. Leavitt* (1857) 15 N.Y. 9 and *Ewell vs. Daggs* (1883) 108 U.S. 143, 2 Sup. Ct. 408. An earlier case upon the point in the United States Supreme Court, one of the leading cases in this country, is *Saterlee vs. Matthewson* (1829, U.S.) 2 Pet. 380. See also *Gross vs. United States Mortgage Co.* (1883) 108 U.S. 477, 488, 2 Sup. Ct. 940, 946. One of the earliest and best-considered cases in the State of New York is *Van Rensselaer vs. Snyder* (1855) 13 N.Y. 299, 303. See also *Syracuse City Bank vs. Davis* (1853, N.Y.) 16 Barb. 188; *Washburn vs. Franklin* (1861, N.Y.) 35 Barb. 599; *Johnson vs. Bentley* (1847) 16 Ohio, 97, 100.

⁴⁶ (1894) 94 Tenn. 123, 149, quoting from 2 Story, *The Constitution* (5th ed. 1891) 703

may therefore be repealed, and the advantage thereby taken away. To illustrate this remark, if by law a conveyance should be declared invalid if it wanted the formality of a seal; or a note, if usurious interest was promised by it; *or if in any other case, on grounds of public policy, a party should be permitted to avoid his contract entered into intelligently and without fraud, there would be no sound reason for permitting him to claim the protection of the Constitution, if afterwards, on a different view of public policy, the Legislature should change the rule, and give effect to his conveyance, note, or other contract, exactly according to the original intention.* Such infirmities in contracts and conveyance are often cured in this manner, and with entire justice; and the same may also be done with defects in legal proceedings, occasioned by mere irregularities. (*Italics ours.*)

Judge Cardozo, who wrote the opinion in *Jacobus v. Colgate*,⁴⁷ clearly perceived the distinction between that case and the point involved in the *Berkovitz* case. He said:⁴⁸

Our decision in *Jacobus v. Colgate*, much relied upon by counsel, has little pertinency here. We dealt there with a statute which gave a remedy for a wrong where there had been no remedy before. Right and remedy coalesced, and took their origin together. Finding them so united, we construed the statute which defined them as directed to the future. Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one.

We think the promise to arbitrate must be held within the statute, and the subject-matter of the controversy within the purview of the promise.

The claim that the statute was unconstitutional in depriving the party of his right of trial by jury was disposed of by the Court of Appeals in these words.⁴⁹

⁴⁷ (1916) 217 N.Y. 235, 111 N.E. 837.

⁴⁸ *Matter of Berkovitz vs. Arbib & Houlbert*, *supra* note 1, at p. 272, 130 N.E. at p. 290.

⁴⁹ *Ibid.* 273, 130 N.E. at p. 291

The statute is assailed as inconsistent with article I, section 2, of the Constitution of the state, which secures the right of trial by jury. The right is one that may be waived. It *was* waived by the consent to arbitrate. We are told that the consent must be disregarded as illusory because the parties could not be held to it till the statute was adopted. A consent, none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future. They must abide by its vicissitudes.

At the same time that the New York Court of Appeals decided the *Berkovitz* case, it decided *Spiritusfabriek Astra v. Sugar Products Company*. In the latter case a contract for molasses was made in July, 1914. One of the provisions in the contract was: "The regular arbitration and force majeure clauses are to form part of this contract. . . . It is agreed in the event of an arbitration being called, it is to sit in London." The plaintiff, the buyer, brought action against the seller in July, 1916. The defendant answered with defences and counterclaims. Between July, 1916, and April 19, 1920, there was active litigation. The Court of Appeals held that, since the plaintiff had spent several thousand dollar for fees and disbursements and that only upon the eve of the trial (June, 1920) the defendant moved for a stay of proceedings until the matters in difference were arbitrated, the statute should not be applied to *pending litigation*, and that clear contrary intention could not be found in the language of the statute. The decision in this case stands by itself and, while important to the litigants, plays no important part in the general development and status of the law in New York.

As was said at the outset, the decision in the *Berkovitz* case paves the way for modernizing the American law on the subject of commercial arbitration. At the meeting of the American Bar Association held in St. Louis in 1920, resolutions were adopted calling upon the Committee on Commerce, Trade and Commercial Law to

prepare a Federal law on the subject.⁵⁰ The first draft of such a bill was presented at the 1921 session of the Association and the Committee is now re-drafting the bill.

Thus is the Bar of our country responding, at least in one field, to the call that *anachronisms in the law be abolished*⁵¹ and the law be made to conform to modern needs and conditions.

THE MASSACHUSETTS LAW ANALYZED⁵²

The statute and the comment on the various sections may be more intelligently read if the scheme of the statute is first understood. (1) The first 13 sections represent substantially the statute as it existed prior to 1925, although some sections were modified in 1925 in slight degree. These sections were intended to apply only to submissions of disputes to arbitration by agreement made after the controversy had arisen. (2) Sections 14 to 22 were added by Chapter 294 of the Laws of 1925 which also amended the earlier sections in minor degree. These sections so added were intended to make enforceable clauses in contracts providing for the arbitration of disputes which might arise out of the contract *in the future*. The provisions of the earlier sections relate primarily to procedure and are made applicable to proceedings under the new sections so far as consistent.

THE MASSACHUSETTS ARBITRATION ACT CHAPTER 251, GENERAL LAWS OF MASSACHUSETTS, AS AMENDED BY CHAPTER 294, LAWS OF 1925

(1)

SECTION 1. Controversies which might be the subject of a personal action at law or of a suit in equity may be submitted

⁵⁰ Charles A. Boston, of New York. "I have a second motion. I ask that this be referred without debate to the Committee on Commerce, Trade and Commercial Law of the American Bar Association. It is that that committee be requested to consider the report at the next annual meeting of this Association upon the further extension of the principle of commercial arbitration."—45 *Reports of American Bar Association* (1920) 75.

⁵¹ See paper by Dean Roscoe Pound, *Anachronisms in Law*, delivered before the Conference of Bar Association Delegates at Saratoga Springs, N.Y., September 3, 1917-(1920) 3 *American Judicature Society Journal*. 142.

⁵² This analysis was prepared by the Massachusetts State Chamber of Commerce, Edward G. Stacy, secretary, with the assistance of Charles L. Bernheimer, Kenneth Dayton, Esq. of New York City, Richard C. Curtis, Esq. and J. C. Jones, Jr.

to the decision of one or more arbitrators, as provided in this chapter.

Comment

This section relates only to the submission of an existing controversy and not to agreements to arbitrate disputes to arise in the future.

SECTION 2. The parties in person or by their lawful agents or attorneys shall sign an agreement in substance as follows:

STATUTORY FORM OF SUBMISSION

Know all men that.....of....., and.....
of....., hereby agree to submit the demand, a statement
whereof is hereto annexed, (and all other demands between
them, as the case may be), to the determination of.....and
....., the award of whom, or of a majority of whom, being
made and reported within one year from this day to the superior
court for the county of....., the judgment thereon shall
be final; and if either of the parties neglects to appear before
the arbitrators, after due notice given to him of the time and
place appointed for hearing the parties, the arbitrators may
proceed in his absence. Dated this day of
in the year

.....
.....

Comment

This is the form for submission to arbitration of existing controversies, and although the statute declares that the agreement between the parties shall be "in substance" in the form of the statute it is advisable to follow the form word for word with appropriate insertions in the blanks. It will be noted that these blanks call for the names of the parties and their addresses, the names of the arbitrators and the court to which the award is to be reported. There should also be attached to the agreement a brief but comprehensive statement of the controversy which is to be arbitrated, and if it is only a submission of a particular dispute and not of all possible disagreements between the parties, there should be stricken out of the agreement the words appearing in the statute in parenthesis "(and all other demands between them, as the case may be)."

SECTION 3. If a specific demand is submitted to the exclusion of others, it shall be set forth in the statement annexed to the agreement; otherwise, it shall not be necessary to annex any statement of a demand, and the submission may be of all demands between the parties or of all demands which

either has against the other. The submission may be varied in this respect in any other manner, according to the agreement of the parties.

Comment

This section makes unnecessary a statement of the dispute between the parties if it is the sole dispute or if all disputes between the parties are to be arbitrated, but the better practice as indicated in the comment following Section 2 is to state the controversy in any case for the guidance of the arbitrators and of the court if the matter is eventually referred to it. It should be noted that the parties are entirely free to limit the arbitration as they may desire by excluding any disputes which they do not wish arbitrated or by stating the particular aspect of the controversy which they wish to have determined.

SECTION 4. An agreement to submit all demands shall include only such as might be the subject of a personal action at law or of a suit in equity.

Comment

The limitation of this section is a material one since it refuses the sanction of the law to the arbitration of any dispute which could not be the subject of an action at law or a suit in equity. In other words, although there have been no decisions of the courts on this clause, it is probably intended that the parties might not ask specific performance of a contract for the sale of ordinary merchandise when the only remedy available in the courts would be an action for damages. Similarly there is some question whether there could be submitted to arbitration under the statute a question relating to a contract for which there was no consideration. These two instances are simply illustrative of cases in which the statute can not be invoked.

It should be understood that the parties can make any submission to arbitration that they wish whether it complies with this requirement of the statute or not, but unless it complies with the statute the remedies given for enforcing the proceeding and the award are not available to the parties. In other words, a party may withdraw from the arbitration at his will and his continuance is dependent entirely on his good faith.

SECTION 5. The time within which the award shall be made and reported may be varied according to the agreement of the parties, but no award made after the time fixed by the agreement shall have any legal effect, unless made upon a recommitment by the court to which it is reported.

Comment

It is permissible for the parties to fix a time within which the award may be rendered but it is not necessary unless there is

some particular reason for limiting the time. Such limitation is not especially advisable because competent and honest arbitrators will not permit any unnecessary delay in any case, and on the other hand, there are sometimes unforeseen contingencies which make the arbitration take longer than was originally expected. It is to be noted, however, that in the agreement for submission set forth in Section 2 of the act the award must be reported to the court within a year from the date of the agreement. Whether this period could be extended by agreement of the parties is uncertain. Under the language of the corresponding section, Section 19, the court on application of the arbitrators may extend the period of one year and it is to be hoped that the court would hold itself at liberty to recognize an agreement of the parties to extend the time beyond a year in the case of a submission. The necessity of such an extended period, however, will be extremely rare. The period within which the award must be rendered may, however, be made shorter.

SECTION 6. Neither party may revoke the submission without the consent of the other; and if either neglects to appear after due notice, the arbitrators may hear and determine the cause *ex parte*.

Comment

What constitutes "due notice" has not been judicially declared, but undoubtedly what is required is a reasonable notice in view of all the circumstances of the case, i. e., the place of residence of a given party, the intricacies of the case to be presented, the necessity of producing witnesses or evidence from a distance and similar circumstances.

SECTION 7. All the arbitrators shall meet and hear the parties, but an award by a majority of them shall be valid, unless the concurrence of all is expressly required in the submission. In the case of the death of an arbitrator or of his inability or refusal to serve, the superior court shall, upon the application of either party, name an arbitrator in his stead.

Comment

The second sentence of this section was added by the 1925 statute. Presumably in case of a vacancy the two parties may act together to nominate a substitute, and it is quite possible that in their agreement or in the rules by which they agree to be bound, there might be included a provision that a substitute should be named by the same method by which the original arbitrator is named, i. e., the selection of a given party, the concurrent action of the remaining arbitrators, the nomination of some third party or so on. The power of the court would be

exercised only if the parties could not or had not agreed upon the method of naming the substitute or upon his identity as the case might be.

SECTION 8. The award shall be delivered by one of the arbitrators to the court designated in the agreement, or shall be enclosed and sealed by the arbitrators and transmitted to the court, and shall remain sealed until opened by the clerk.

Comment

It is to be noted that contrary to the practice in some other states, the award is to be delivered to the court designated in the agreement and not to the parties. However, the better practice is to deliver copies to the parties in addition so that they may be advised of the decision at the earliest moment.

SECTION 9. The award may be returned at any time limited in the submission, and the parties shall attend without any express notice for that purpose; but the court may require actual notice to be given to either party before it acts upon the award.

Comment

It is under this section that formal notice of the award is given to the parties and that such action as is necessary to enforce it is taken. While the statute prescribes that there need be no express notice except by direction of the court, it is hardly conceivable that a court would not require actual notice to be given to a party before entering an order for enforcement of the award. Such notice is essential so that the defeated party may have the opportunity to present any of the matters by which he believes he can impeach the award. (See comment following Section 12.) What the notice to be required will be must depend upon the practice in each court.

SECTION 10. The court shall have cognizance of the award in the same manner, and may proceed thereon, as if it had been made by referees appointed by a rule of court, and may accept, reject or recommit it to the same arbitrators for a rehearing. When accepted and confirmed by the court, judgment shall be rendered hereon as upon a like award by referees.

Comment

To what extent the court has jurisdiction to review questions of fact and law involved in the award is not satisfactorily settled in Massachusetts. It is quite clear that under Section 20 questions of law arising in an arbitration under a clause in a contract

providing therefor must be brought before the court by some affirmative action taken before the award becomes final. Whether the provisions of this section are extended by the provision in Section 12 that an appeal may be founded on matters of law apparent upon the record is uncertain. The provisions in Section 12 may refer either to matters of law apparent on the record of the arbitration or merely to questions of law apparent on the record of proceedings in court after the award has been rendered, i. e., errors committed by the court and not by the arbitrators. The language of Section 10 interpreted literally is sufficiently broad to give the court power to review the action of the arbitrators both as to fact and law, but the better modern practice is to hold the award of the arbitrators final upon both classes of questions except as specifically limited by the agreement of the parties or by a statutory clause. It is always competent for the parties to reserve from the submission to the arbitrators any questions of law or fact which they desire, or otherwise to limit the jurisdiction of the arbitrators, and it is quite clear that under Section 20, in any controversy arising out of contractual clauses, questions of law may always be reserved for the court. Subject to these two limitations, it is to be hoped that the courts will interpret Section 10 as permitting the court to review the action of arbitrators only where there is an allegation of fraud, partiality or other misconduct on the part of the arbitrators involving something more than an erroneous judgment as to the facts or the law. The mere fact that the court would not have decided as the arbitrators did should be no ground for impeaching a proceeding since not infrequently the very reason for the submission to arbitration is to escape from decisions rendered upon technical grounds.

Included in misconduct of the arbitrators, which should be ground for vacating an award, is action by which the arbitrators exceed their power or fail to render a mutual, final and definite award upon the subject matter submitted. It appears doubtful whether a Massachusetts court has the power to modify or correct an award for miscalculation or mistake evident on the face of the award but susceptible of correction without affecting the merits of the decision.

SECTION 11. If there is no provision in the submission relative to costs and expenses, the arbitrators may make an award relative thereto, including compensation for their own services; but the court may reduce the charge for compensation. All expenses of arbitration under this chapter shall be borne by the parties.

Comment

It is advisable that the submission to arbitration or the rules of the association under which the arbitration is held should provide for the compensation to the arbitrators and for the

division of costs and expenses. It is entirely proper to assess the entire cost of the proceeding on the losing party or to apportion the cost between the two, but it is of the utmost importance that the fees of the arbitrators and the items allowed for expenses should be reasonable, and this is best assured by a preliminary agreement.

SECTION 12. An appeal founded on matter of law apparent upon the record shall be allowed from any order or judgment of the superior court on an award made under this chapter; or a party aggrieved may bring a writ of error for any error in law or fact as in other cases. The supreme judicial court shall thereupon render such judgment as the court below ought to have rendered.

Comment

The scope of this section appears to be limited to errors in the action of the court in confirming, vacating, modifying or otherwise dealing with the award and not to errors in the award. In other words, any attack upon the award itself should be made under Section 10, while under Section 12 objection is to be taken to the procedure of the court in acting upon the award. However, this permits a review of the court's action under Section 10 in confirming, vacating or modifying the award and for the same grounds and those grounds only. In other words, upon appeal the court is limited so far as the award is concerned to matters raised before the first court and in addition may review any questions raised as to whether the procedure of the court in passing upon the award was correct.

SECTION 13. Fees in court shall be the same as for like services relative to an award made under a rule of court.

No comment

SECTION 14. The parties to a contract may agree in writing that any controversy thereafter arising under the contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of one or more arbitrators.

Comment

This section marks a change in the policy of Massachusetts and validates and makes enforceable a written clause in the contract providing for the arbitration of a dispute arising under the contract at some *future time*. It must of course be such a dispute as could be made the subject of an action at law or a suit in equity. (See comment above on Section 1.) The clause need be in no particular form and may either provide for arbi-

tration of all disputes arising under the contract or of any particular ones.

SECTION 15. Such an agreement may either name the arbitrator or arbitrators or may define the method by which an arbitrator or arbitrators are to be chosen. In case of the death, inability, or refusal to serve of any person so named, or in case the method of choosing arbitrators prescribed by the parties becomes impossible of performance because of the default of one of the parties or otherwise, or in case such agreements fails either to name or to provide a method for choosing an arbitrator or arbitrators, the superior court shall upon the application of either party, name an arbitrator or arbitrators.

Comment

This section provides a method of enforcing an agreement to arbitrate future disputes where one party defaults or for some other reason the arbitrators cannot be selected. Such a provision was unnecessary under the earlier sections because in that case the parties named the arbitrators in their submission. It is to be noted, however, that under this section the parties may either name the arbitrators or prescribe the method for their selection and this method of selection may involve their being named by a third party such as an officer or committee of a trade association or chamber of commerce, and in the latter case it would appear that there should be no necessity for invoking the aid of the court merely because one party refuses to join in the proceeding. The person or body designated to choose the arbitrators may name them and give notice to the parties to the dispute to proceed, and if one fails to appear the arbitration is conducted in his absence. It is competent for the parties to agree that a particular committee shall be the arbitrators without naming the individuals, leaving the personnel to be determined by the personnel of the committee at the time the dispute arises.

SECTION 16. If a party to the contract be named as arbitrator, or the agent or agents or employees or employees of any one party to the contract be named in the contract or selected by the method therein defined as sole arbitrator or as a majority of the arbitrators under such agreement, the provisions of sections fourteen to twenty-two, inclusive, shall not apply.

Comment

This section prohibits the selection as arbitrator of any of the parties or the selection of employees or agents of a party either

as sole arbitrator or as a majority of the arbitrators. The established practice by which each party names one arbitrator and the two so named select a third is permitted, subject to the limitations of this rule. There is obviated the danger that the large concern may insert in its contracts a provision requiring the submission of all disputes to the decision of one of its own employees. The section probably does not apply to the provision common in building contracts submitting disputes to the final determination of the architect because such submission is not regarded as a technical arbitration and there is actually an appeal from the architect's decision to the courts or to a true arbitration, as the case may be.

Although under this section a party may appoint an agent or employee as one of a number of arbitrators, such a selection is bad practice and is to be discouraged. Arbitrators should not be advocates and no board should be so constituted that an advocate of a party is likely to be included as one of the arbitrators.

SECTION 17. The submission shall be made within six months, unless otherwise stipulated by the parties, but in no event within less than a reasonable time, after due notice by any party to the contract claiming the arbitration of any controversy thereunder.

Comment

It is to be noted that if a longer extension of time is for any reason desired there must be express agreement to that effect and that a shorter period may be prescribed by express agreement which must, however, be reasonable under all of the circumstances. (See comment on Section 6 above.)

SECTION 18. If any one of the parties neglects to appear before the arbitrators after due notice is given to him of the time and place appointed for hearing, the arbitrator or arbitrators shall proceed in his absence.

See comment under Section 6 above

SECTION 19. The award of the arbitrator, or of a majority of the arbitrators, being made and reported to the superior court within one year from the date of the submission or within such further time as the court may upon the application of the arbitrator or arbitrators allow, the judgment thereon shall be final.

Comment

Where the party against whom the award is rendered does not comply with its terms, the arbitrator may report the award to

the superior court and thereupon under this section a final judgment is entered thereon. It seems, however, that under the provisions of Section 22 there are made applicable to these proceedings the provisions of Sections 8 and 9 commented upon above. This section permits the enforcement of an award as a judgment of the court but subject to the right of the losing party to attack its validity as above noted.

SECTION 20. Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the court to which the report is to be made. Upon application by a party at any time before the award becomes final under section nineteen, the superior court may in its discretion instruct the arbitrator or arbitrators upon a question of substantive law.

Comment

We have already commented under Section 10 above upon the power of the court over questions of fact and law generally. By this section specific permission is given to present questions of law to the court at the request of all parties or at the request of one party at any time before the award becomes final, i. e., before it is presented to the court under Section 19. The distinction between the two references apparently is that the parties by unanimous agreement may have any question of law, whether it relates to the merits of the controversy or to the procedure in the case, decided during the progress of the arbitration, while short of such unanimous agreement one party alone may have a question of substantive law but not of the law of procedure reviewed by the court. In the second instance, it lies in the discretion of the court whether it will instruct the arbitrators on the law or not. It appears that if the appeal is made to the court by a single party after an award has been rendered the arbitrator may correct his award in view of the court's ruling. This conclusion seems to follow from the language of the statute that it may "instruct" the arbitrator. The obvious intention is to provide for an award rendered in accordance with the court's idea of substantive law rather than to permit a decision which must be vacated and require an entirely new arbitration due to an error of law.

SECTION 21. If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of either the plaintiff or defendant stay the trial of the suit or proceeding until such arbitration has been had in accordance with the terms of the agreement;

provided, that the applicant for the stay is ready and willing to submit to arbitration.

Comment

This section permits any party to an arbitration agreement to prevent an action in court on the same dispute provided that the agreement for arbitration is applicable to the particular controversy. It appears also that a party desiring to arbitrate may nevertheless first commence an action and secure an attachment or an injunction or similar relief against the defendant's property and then demand arbitration, in which case the attachment probably will stand pending the arbitration.

SECTION 22. Proceedings under Sections fourteen to twenty-one, inclusive, shall be governed by the provisions of Section 6 to 13, inclusive, not inconsistent therewith.

Comment

The procedure for the proceedings under the new Sections 14 to 21 are to be governed by the old sections so far as is consistent. It appears that the old sections are consistent in most cases, except of course as to the form of the agreement in Section 2.

SECTION 6. (of Chapter 294, Laws of 1925). This act shall not apply to contracts made prior to the taking effect hereof. Sections 1 to 5 of this act amended certain parts of existing Sections 1 to 13 of the old law and added Sections 14 to 22. Section 6 then provided "this act shall not apply to contracts made prior to taking effect hereof."

Comment

The present arbitration law applies only to contracts dated April 29, 1925, and subsequent. As to any contracts bearing an earlier date, reference must be made to the arbitration law as it stood before the 1925 amendment.

FORM OF SUBMISSION "A"
ARBITRATION BETWEEN

.....

and

.....

The above entitled parties, having by agreement dated..... agreed to submit to arbitration a dispute, controversy or matter of difference between them, which briefly stated is as follows:

We do hereby voluntarily submit the same and all matters concerning the same to as arbitrator, pursuant to the

laws of the State of Massachusetts and the rules and regulations of the committee on arbitration of, and we agree to stand to, abide by and perform the decision, award, order, orders, and judgments, that may therein and thereupon be made under pursuant and by virtue of this submission.

We further agree that a judgment of the Superior Court of the Commonwealth of Massachusetts may be entered in either district in the Commonwealth in which we reside or have a usual place of business.

Dated:

FORM OF SUBMISSION "B"
ARBITRATION BETWEEN

.....

and

.....

The above entitled parties, having by agreement dated _____ agreed to submit to arbitration a dispute, controversy or matter or difference between them, which briefly stated is as follows:

We do hereby voluntarily submit the same and all matters concerning the same to _____ and _____, as arbitrators, pursuant to the laws of the State of Massachusetts and the rules and regulations of the committee on arbitration of _____, the said arbitrators to select a third from the list of official arbitrators compiled by the committee on arbitration of _____, and we agree to stand to, abide by and perform the decision, award, order, orders, and judgments, that may therein and thereupon be made under, pursuant and by virtue of this submission.

We further agree that a judgment of the Superior Court of the Commonwealth of Massachusetts may be entered in either district in the Commonwealth in which we reside or have a usual place of business.

Dated:

FORM OF SUBMISSION "C"
STATUTORY FORM OF SUBMISSION

Know all men that _____ of _____, and _____ of _____, hereby agree to submit the demand, a statement whereof is hereto annexed, (and all other demands between them, as the case may be), to the determination of _____ and _____, the award of whom, or of a majority of whom,

being made and reported within one year from this day to the Superior Court for the county of _____, the judgment thereon shall be final; and if either of the parties neglects to appear before the arbitrators, after due notice given to him of the time and place appointed for hearing the parties, the arbitrators may proceed in his absence. Dated this _____ day of _____ in the year _____ .

.....

STANDARD ARBITRATION CLAUSES

Any controversy arising under this contract (with the exception of) shall be submitted to the determination of.... for arbitration in accordance with the laws of the Commonwealth of Massachusetts (and under the rules of.....so far as consistent therewith) within _____ days after due notice by either party to this contract claiming the arbitration of any controversy thereunder.

Any dispute arising under, out of or in any manner connected with this contract shall be submitted to arbitration in accordance with the laws of the Commonwealth of Massachusetts.

Any dispute arising under, out of or in any manner connected with this contract shall be submitted to arbitration in accordance with the rules of the Committee of Arbitration.

Any dispute arising under, out of or in any manner connected with this contract shall be submitted to arbitration by _____ of _____ in accordance with the laws of the Commonwealth of Massachusetts.

INTERNATIONAL TRADE RELATIONS

INTERNATIONAL COMMERCIAL ARBITRATION¹

INTRODUCTION

The two general meetings of the International Chamber of Commerce which have already been held, have made it clear that in the judgment of its members it is the legitimate business of the International Chamber to do everything in its power to facilitate the settlement of misunderstandings and disputes between business men of different countries. As a result of a resolution adopted at the Organization Meeting of the Chamber (Paris, June 1920), a Select Committee on international business arbitration was appointed and made a careful study of the entire question. This Committee presented, through the Distribution Group, a memorandum and code for the consideration of the first Congress of the Chamber (London, June 1921). The London Congress, on the recommendation of the Distribution Group, adopted two resolutions—Nos: XIV and XV—which (in non-technical language) record that the voting members of the Chamber have declared themselves unanimously in favor of a system of arbitration by the International Chamber, that they are willing to entrust to the Council the task of approving and setting in motion such a system, but that they desire that a further study of details be made by the Standing Committee on Commercial Arbitration, and submitted to the Council before the latter body authorizes the establishment of the machinery by International Headquarters.

¹ By Owen D. Young, *International Chamber of Commerce. Digest*, No. 3, October 15, 1921.

As Chairman of the Committee on Commercial Arbitration of the Chamber of Commerce of the United States, I have been asked to set forth the point of view of the American Section of the International Chamber with regard to this question, and it is to this Standing Committee, therefore, that I venture to address the following observations.

The field of international commercial arbitration is one in which the International Chamber of Commerce may well play an important and influential part. Its success, however, will depend on the recognition by the Chamber and by its individual members of the inherent difficulties and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the co-operation of these countries, therefore, some system of arbitration *outside the law* must be provided.

On the other hand, it is clear that wherever such legislation now exists, and wherever business men are accustomed to take advantage of it—and this is true not only nationally in Continental countries like Italy and Belgium, but also, I understand, internationally in certain trades, as for example silk and cotton—it would be wise for the Chamber to take full advantage thereof, and a code for arbitration *within the law* is therefore equally necessary.

If we may judge by the experience of the efforts of the Chamber of Commerce of the United States and the *Bolsa de Comercio* of Buenos Aires, which have for six years jointly conducted a system of commercial arbitration between business houses of the United States and of South America, the results which would follow a

disinterested and competent form of international arbitration, applicable to all the countries in which the International Chamber is represented, will be great and far-reaching. And this influence will not be appreciably lessened by the fact that at the beginning the International Chamber of Commerce may not see its way to dealing with every conceivable preference of the parties in conflict.

In my judgment, it would be wise, under the circumstances, for the International Chamber not to attempt to set up machinery designed in advance to cover every possible case, but rather to begin by designating certain conditions under which the Chamber is prepared to tender to business men its good offices in arranging for arbitration.

I see no reason why the International Chamber cannot immediately offer to business men three separate types of service.

ARBITRATION WITHIN THE LAW

In the first place, it can formulate a code of arbitration within the law, and conduct, under the provisions of that code, arbitration between business houses which have in advance jointly agreed to abide, in the case of dispute, by the terms of an arbitration conducted under the auspices of the International Chamber, and based, for its enforcement, upon the legal sanctions existing under the laws of the countries in which these houses are situated.

ARBITRATION OUTSIDE THE LAW

In the second place, the Chamber can build up a separate code of arbitration, studied with equal care, designed for the service of those business houses which agree in advance to abide by the results of an arbitration outside the law, and based for the enforcement of its award not upon a legal but upon a moral sanction, such as can be

exercised by the International Chamber of Commerce itself, and by member National Committees, with all the force that business men of a country can bring to bear upon a recalcitrant neighbor.

Before agreeing to conduct an arbitration outside the law, even when both parties should join in a request, the International Chamber should be convinced that the business men of both countries concerned are sufficiently well organized and that the business organizations are willing to exert moral pressure, if need be, in favor of carrying out the arbitration decision outside the law, and are sufficiently influential to make such pressure effective.

CONCILIATION

In the third place,—and here my belief is founded particularly upon the experience of the arbitration scheme between North and South America, already referred to—the International Chamber of Commerce, upon receipt of an appeal from an interested party for arbitration either within or outside the law, may tender its good offices as an Agent of Conciliation with a view to seeing whether the difference between the two parties is not, after all, based upon a misunderstanding on the part of one or the other, rather than upon a desire on either side to avoid the fulfilment of the original terms of the contract. It has been the experience of those charged with the administration of the United States-Argentine arbitration scheme that in perhaps nine cases out of ten, an impartial preliminary examination of the documents submitted by the two parties will demonstrate the existence of such a misunderstanding and that the two parties may be brought to an agreement without involving either the expense or the delay of a formal arbitration. It should be noted that while in the experience of the western hemisphere this process of Conciliation has proved to cover the great majority of cases submitted for formal arbitration, few, if any, of these cases would

have reached the attention of a disinterested third party, if the existence of machinery for arbitration were not generally known and if recourse had not been had to such machinery to settle differences arising with regard to the execution of contracts. In other words, the possibility for friendly settlement without arbitration depends on the existence and knowledge of facilities for arbitration. The opportunities for Conciliation are inherent in the organization of the International Chamber itself, and no special code of procedure is necessary, or even desirable, to bring these forces into play.

A LIMITED OBJECTIVE

I venture to emphasize again the fact that no attempt has been made in the foregoing outline to cover every possible case. For example, whenever the two parties of a business dispute find themselves unable to agree in advance, either upon arbitration within the law or arbitration outside the law, the International Chamber, under the proposed arrangement, will make no attempt to conduct an arbitration. Furthermore, even if both parties agree in advance to an arbitration outside the law (*i. e.* based upon moral sanction) the Chamber should not undertake the arbitration, unless it is persuaded that the basis for the requisite moral sanction exists in the country or countries concerned, to insure the effective carrying out of the award, when made.

In my judgment, this is not a defect. A practical solution of the complex problem before us is most likely to be reached, if we make no attempt to settle everything in advance, but concentrate our efforts rather upon getting a movement started, even on a modest scale, and leaving further developments to follow, in due course, and as a result of successive demonstrations that the International Chamber is in a position to furnish prompt and economical settlement of *certain* types of business disputes. In this way, the machinery of the Chamber

can itself develop, step by step, to meet the demands upon it, and the appeals for co-operation, which the Chamber must constantly make upon business houses and business organizations, can be based upon results actually obtained rather than upon theoretical reasoning. Whether or not the original contract makes provision for a reference to the International Chamber of Commerce in case of dispute, the Chamber should, I think, make it clear that it stands ready to examine any case which the two parties agree to bring before it, with a view, if possible, to organizing an arbitration or otherwise assisting in the settlement of the difference.

Let me state at this point my conviction that the real function and opportunity for usefulness of the Chamber in this whole field is not to interest itself primarily in the punishment of the relatively few dishonest and tricky business men with whom the Chamber is likely to come into any business relation, but rather to provide for the honest and well-intentioned men, who form the vast majority, a prompt and effective means of clearing up difficulties which now interfere with the satisfactory conduct of their affairs.

To turn again to the experience of the Chamber of Commerce of the United States and the *Bolsa de Comercio* of Buenos Aires, it has been demonstrated that in the total number of cases which have come before the joint arbitration organization, the cases of deliberate intent to defraud the other party have been so few as to be practically negligible.

A CAMPAIGN OF EDUCATION

Once the code or codes of arbitration of the International Chamber have been formulated and approved by the Council, it should be the task of International Headquarters through the National Committees, the organization and associate members, and otherwise, to study the existing situation in countries affiliated with the Cham-

ber. In those countries where it appears that there now exists neither provision for arbitration under the law, nor that degree of business organization and standard of business sentiment which are essential if arbitration outside the law is to be effective, the Chamber should, through these agencies, encourage the development of whichever type of arbitration (either within or outside the law) is most in keeping with the business traditions of the country in question. The Chamber should look forward, certainly, to the time when every civilized country will have adequate legal provision for the carrying into effect of properly conducted business arbitrations, but it must recognize the fact that at the present time, and probably for many years to come, it is equally important in the general interest for the Chamber to support and develop the moral sanction upon which arbitration outside the law must depend.

The International Headquarters of the Chamber should moreover urge that in every contract for the purchase and sale of merchandise entered into between a business man of one member country and a business man of another member country there should be an agreement to arbitrate differences according to the rules of the International Chamber.

The Chamber might further establish a register upon which it would enter each business house that undertook to use such an agreement in its contracts when the other party would likewise consent.

In securing such preliminary co-operation among business houses, the Chamber will naturally take advantage of the existence of National Committees in each member country and of the fact that each organization member of the Chamber is, itself, composed of a number of business houses.

A PROMPT BEGINNING

Should the Committee on Commercial Arbitration recommend, and the Council approve, some such simple

and elastic system as the foregoing, it would be possible for the International Chamber to set up, in consultation with the several National Committees, panels of competent arbitrators, without waiting for the full development of the campaign of education.² It would from then on be in a position to accept for settlement such business differences as may by mutual consent be submitted to it; and thereafter experience in actual arbitration and the process of general education would go hand in hand toward the fuller realization of the broad program to which the International Chamber is committed.

A COURT OF INTERNATIONAL COMMERCIAL ARBITRATION: SUMMARY OF CODE OF RULES³

SUMMARY OF CODE OF RULES

The Code of Rules governing the International Chamber's plan for adjusting commercial differences is very comprehensive and covers:

I. CONCILIATION.

II. ARBITRATION, in countries where awards are not enforceable by law.

² This was done later.—*Editor*.

³ Issued by American Section, International Chamber of Commerce, Washington, D.C. American members: The members of the Court of Arbitration are practical business men of wide experience and are thoroughly familiar with arbitration in all its phases. The names of the American members are set out below. The other member countries of the Chamber are similarly represented. Owen D. Young, Chairman of the Board, General Electric Company, New York; Newton D. Baker of the firm of Baker, Hostetler and Sidlo, Attorneys, Cleveland, Ohio, formerly Secretary of War, formerly President, Chamber of Commerce, Cleveland; Irving T. Bush, President, Bush Terminal Company, New York, President, Chamber of Commerce of the State of New York; Edgar Carolan, General European Director of the International General Electric Company, Paris; R. Goodwyn Rhett, President, Peoples National Bank, Charleston, South Carolina, formerly President, Chamber of Commerce of the United States; Henry M. Robinson, President, First National Bank, Los Angeles, Vice President, Chamber of Commerce of the United States, Alternate Director, International Chamber of Commerce; M. J. Sanders, New Orleans, Louisiana; Frederic S. Snyder, President, Batchelder and Snyder Company, Boston, formerly President, Chamber of Commerce of Boston; Thomas E. Wilson, President, Wilson and Company, Chicago, formerly President American Institute of Meat Packers.

III. ARBITRATION, in countries where awards are enforceable by law.

I. CONCILIATION

Procedure

In seeking the aid of the Chamber in conciliation cases, copies of contracts and documentary record of transaction with a statement of claim should be sent to the Secretary, American Section, International Chamber of Commerce, Mills Building, Washington, D. C.

Submission of Other Party

The General Secretary of the Chamber will then urge the other party: through the National Committee of the country in which he is resident, to agree to conciliation and to submit a similar statement of his case, together with supporting documents.

Consideration by Commission

Both statements will be placed before the Administrative Commission (composed of one representative from each member country of the Chamber) and the Commission will attempt to arrive at a basis of agreement acceptable to both parties.

No Prejudice

If no agreement is reached, nothing that has been done, said or written, shall in any way prejudice the right of either party to submit the case to arbitration or litigation.

II. AND III. ARBITRATION

Procedure

The general procedure outlined in the first and second paragraphs under "Conciliation" should be followed in submitting a case for arbitration, supplemented by a request that the arbitration be conducted under the auspices of the International Chamber of Commerce.

The request for arbitration with the pertinent documents submitted by both parties in the case will be examined by the Executive Committee of the Court of Arbitration.

Arbitrators

If the case is deemed suitable for arbitration, the Court will select technically qualified arbitrators from a list furnished by the National Committees. There will be either one arbitrator, two arbitrators and an umpire, or three arbitrators, as the interested parties may decide.

Delegation of Arbitration

The Court may, with the consent of both parties, delegate any specific arbitration to an Organization Member of the Chamber which maintains suitable machinery.

Legal Sanction

If legal sanction for the execution of arbitration awards exists in the countries in question, the Court of Arbitration requests the signature of both parties to a special form of submission in which the arbitrators are named, and which binds the parties to full acceptance of the terms of the award. The Court of Arbitration may direct arbitration to proceed in default if one of the parties refuses to sign. Federal legal sanction of commercial arbitration does not exist in the United States, but a few states, including New York and New Jersey, have laws which recognize the enforceability of commercial arbitration awards.

Costs

The Court of Arbitration may require one or both of the parties to deposit such sum as the Court of Arbitration deems necessary to provide adequate security for payment of expenses. The arbitrators are entitled to reimbursement of expenses. If fees for arbitration are customary in the countries where arbitrations are held, they

are entitled to such fees. If not, they render their services gratuitously.

The arbitrators may obtain or accept legal or technical advice and include the expense as part of the cost.

The award of the arbitrators, in addition to a decision on the merits, also determines which of the two parties is responsible for the cost, or in what proportion the cost should be divided.

Time and Place

The National Committee, in consultation with the arbitrators, arranges the time and place of hearings and in general determines and regulates procedure. Arbitration as a general rule will take place in the country where the goods, etc., causing the dispute are located.

Time of Award

The Court of Arbitration fixes the period within which the arbitrators should render their award, which should not, under ordinary circumstances, exceed sixty days.

Evidence

The arbitrators may take evidence (where the law permits) in countries other than that in which arbitration takes place.

Default

If one of the parties fails to present his case before the arbitrators, after both parties have agreed to arbitration, an award in default may be declared by the Court of Arbitration.

Provisional Decision

The arbitrators, at the request of either party, have the right to render a provisional decision and in certain cases to permit the disposal of the articles in dispute.

Awards

The decision of the arbitrators, in writing, is sent to the National Committee in the country where the arbitration takes place. A copy is also sent to the Headquarters of the International Chamber of Commerce. A certified copy of the decision is delivered to each of the parties, after the cost of arbitration has been paid. The confidential nature of the proceedings and the award are safeguarded by the International Chamber. Only the parties to the arbitration may obtain records and certified copies of awards from the Chancellery of the International Chamber of Commerce, 33 Rue Jean-Goujon, Paris, France. Copies of any award certified by two members of the Court of Arbitration, shall be considered as true copies.

Enforcement

(a) Where legal sanction of arbitration awards exists, the enforcement is carried out through due processes of law.

(b) In countries whose laws do not authorize the enforcement of arbitration awards, provision has been made for making effective awards of arbitration under the Chamber's plan by utilization of the good offices of Organization Members of the Chamber, that is to say, chambers of commerce, trade associations, etc. The rules permit the publication in the journals of Organization Members of the name of any person refusing to carry out the provisions of an award. Other means of enforcement are included.

ARBITRATION CLAUSE

The Court of Arbitration recommends the insertion of the following clause in international contracts:

The contracting parties agree to submit to arbitration, in accordance with the Arbitration Rules of the International Chamber of Commerce, the settlement of all disputes in connection with the interpretation of the execution of this contract.

The inclusion of this clause provides for the arbitration of any dispute arising under the interpretation or execution of the contract of which it is a part. However, the arbitration facilities of the International Chamber are available in connection with contracts whether this clause is included or not.

SOME PITFALLS IN THE ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES⁴

The submission of trade disputes in international commerce to arbitration is not without its pitfalls. It is a great principle, but faultily applied it may work greater hardships than a miscarriage of justice in a regularly constituted legal tribunal.

A great many transactions between importers in one country and exporters in another are based upon contracts carrying an arbitration clause. Sometimes the wording of this clause is not carefully thought out; sometimes there is no provision for the carrying into effect of the awards made under the arbitration clause; sometimes the arbitrators fail to grasp the essential principles of arbitration and to take sufficiently high view of their duties.

All of these points are illustrated in a series of controversies arising from faulty shipments in the import of tapioca from the Netherlands East Indies into the United States. In view of the fact that similar conditions may arise, and indeed frequently do, in many other lines of importation into the United States, where American firms are compelled to pay by letters of credit or by drafts and have no effective recourse in case of inferior shipments, it may not be out of place to consider the circumstances attending the complaints of importers of tapioca and to draw such lessons from them as may assist in devising a suitable remedy.

⁴ By A. J. Wolfe, chief, Division of Commercial Laws, United States Department of Commerce. *Economic World*, n.s. 28: 154. August 2, 1924; also *Commerce Reports*. Washington, D.C. July 21, 1924.

A considerable proportion of the tapioca imported into the United States comes from the Netherlands East Indies. The article is largely employed in the textile and paper industries and only a small proportion is used for edible purposes. Due to the efforts of importers, this business has grown in volume from very modest beginnings. The sale of the product is effected by Dutch firms in the Netherlands East Indies, which, in turn, receive their material from a large number of small planters, principally Chinese.

It is customary in this business for the importer to sell quantities of tapioca before the actual receipt of the shipment as contracts must be made to supply the textile and paper mills for a specified future delivery. These deliveries must conform in quality to certain standards.

The importer, on the other hand, finds it very difficult to protect himself as to the quality of the shipment eventually received. The exporter in the Netherlands East Indies may receive from this or that small planter an occasional lot of tapioca that fails to come up to standard. The exporter, on the whole, is little protected from this risk of receiving inferior goods as the importer in the United States, with this additional disadvantage, that he deals with sources of supply of small financial responsibility and of inferior intelligence.

Under the circumstances the practice was inaugurated of inclosing an arbitration clause to contracts whereby in case of a dispute arbitration takes place in New York, the exporter appointing one arbitrator, the importer another, and these uniting on an umpire. For a long time this arrangement was successful. Disputes arose from time to time and awards were made. These awards occasionally failed to cover the entire loss of the importer, but, on the whole, the system was satisfactory.

Recently, however, certain Dutch concerns began to ship lots of tapioca containing such a proportion of fibrous matter that the entire shipment was worthless except as cattle feed. It was no longer a question of receiving a

concession from the exporter and granting a corresponding price reduction to the consumer. The importer had large amounts of money tied up, with the possibility of not turning the goods received to any commercial use and facing contractual obligations toward textile and paper mills, in which case there was no arbitration clause.

In one recent instance the shipment received proved thoroughly worthless. Upon complaint the exporter appointed an arbitrator and the importer another. The two selected an umpire. In view of the technical aspects of the case, all three men turned out to be competitors of the importer. The representative of the exporter in the arbitration said: "I was stung in the same manner only a few weeks ago and all I got was one-eighth of a cent per pound reduction. I am not going to award any more in this case." The arbitrator by this statement betrayed an entirely indefensible conception of his duties as an arbitrator. In another case the arbitrator appointed by the importer, irrespective of the merits of the case, declared that he would hold out for a concession of 1 cent per pound.

The necessity of choosing a personnel for arbitration from the most honorable and conscientious representatives of each trade, therefore, is apparent. By being chosen on that basis and permanently available for arbitration it may be expected that they will demonstrate a much higher conception of duties as arbitrators than those who may be occasionally chosen by parties in dispute. It would be a disgrace for an arbitrator, after receiving a charter as a permanent arbitrator, to be disqualified because of exhibiting the attitude of the two arbitrators referred to.

In the latter instance there was also an example of an arbitration clause unintelligently worded, and without any provision for the execution of the award. By rights the entire shipment should have been rejected as not being legal tender under the contract, and the purchase price

should have been refunded to the importer. Unfortunately, however, the exporter had no available assets in the United States.

The clause, moreover, was entirely one-sided. The exporter receives his money in full under all circumstances and has nothing to arbitrate. It is only the importer who is out his money and, if injured, invokes the arbitration clause only to find that he has inferior arbitrators to rely on, and, if the just award is granted to him, can not collect. Under these circumstances one of the principal importers of tapioca is withdrawing from the business. The Dutch exporters of this product from the Netherlands East Indies must sooner or later realize the folly of killing the goose that lays the golden eggs. After a business has been built up with great effort such treatment extended to the customer can only result in serious loss.

Arbitration requires integrity, intelligence and knowledge. It must be backed up by the honest endeavor of both parties to carry out the award made. The mere insertion of an arbitration clause does not protect, if the arbitration clause is not intelligently worded, and if there is no guaranty that both parties will faithfully carry out their obligations. Moreover, arbitration must have reliable and competent arbitrators, functioning under well-defined principles, and willing and capable to be guided only by facts and not by personal bias.

An interesting side light upon the tapioca arbitration controversy is furnished by the American company involved:

Our experience with the Java exporters of tapioca was quite satisfactory for a number of years, and I think the recent trouble we ran into was due to the lack of knowledge of the material itself. We do not think they wilfully shipped inferior merchandise. We were not alone in receiving this very inferior material. Several other importers suffered in a like manner.

Tapioca is usually bought on a 90-day irrevocable letter of credit. The importer usually places his orders through a broker

in this country. The goods are bought for future shipment. Incorporated in the purchase contract is an arbitration clause. The buyer or importer must take the goods. If the quality is inferior, the matter is subjected to arbitration, each side appointing an arbitrator, and, if they can not agree, an umpire is called in.

This contract seemed to be quite acceptable to all. We can not recall an incident where the quality varied so greatly as to cause discredit to be cast upon the shipper until this year, when the shipper unloaded on this market 500 or 600 tons of an exceedingly low quality, a quality quite unfit for any purpose that I know of.

All these shipments were subjected to arbitration and allowances made, but because of the extremely low quality the award of the arbitration does not compensate the importer as he can not dispose of the material at any price.

This has caused quite a little sensation in this industry, and we believe there will be a modification of the contracts. There is some talk of it. No doubt the shippers will see that the Americans are correct in their contention. No standard form of contract has yet been prepared, nor has there been any meeting held by the trade.

As far as we are concerned, the shipper will have to conform to our ideas and we intend, should we purchase any more of this material, to buy on our own terms. We of course intend to be fair to the shipper as well. We will buy from those firms in Java who are willing to deposit funds in this country and we will reserve the right to cancel the purchase if the goods are so far inferior to the type bought as to be entirely different article and not substitutional for our customers.

INTERNATIONAL ARBITRATION IN COMMERCIAL DISPUTES⁵

THE ACTIVITY OF THE COURT ESTABLISHED IN PARIS

On various recent occasions we have referred to the establishment of a commercial court of arbitration in connection with the International Chamber of Com-

⁵ From *Electrical Review* (London). 91:967. December 29, 1922.

merce in Paris, and through the courtesy of M. Edouard Dolléans, general secretary of the Chamber, we are now able to give official information on the question as set forth in a pamphlet issued by this institution.

The creation of the court is the result of the labours in 1921 and 1922 of an influential committee composed of representatives of a number of countries, and its preliminary work was brought to a conclusion by the drawing up of a plan of conciliation and arbitration between traders of different countries. The principles embodied in this plan were approved by the London congress of the International Chamber in June, 1921, which congress authorized the Council to prepare a definite scheme for the organisation of the court. Regulations were subsequently drawn up by the committee, and these were approved by the Council of the Chamber in July, 1922, when it was decided to publish them and put them into operation.

The scheme includes the formation of a National Committee for each country; each such committee groups together within the country concerned the different members of the International Chamber, and 16 such national committees were in operation last October. Each national committee appoints an Administrative Commissioner resident in Paris to work in collaboration with International Chamber's headquarters.

All correspondence with the parties to a commercial dispute will have to be carried on through the organisation members of the International Chamber if there is no national committee to undertake such communications. As organisation members, the Chamber accepts chambers of commerce and similar institutions, and bankers', manufacturers', or traders' associations, in countries where there is no national committee, pending the formation of such a committee; and a number of organisation members is enumerated in the pamphlet.

Coming to consider the composition of the court of arbitration, it is found that M. Etienne Clémentel, presi-

dent of the International Chamber, also occupies the presidency of the court. Mr. W. Clare Lees, president of the Manchester Chamber of Commerce, and Senor Carlos Prast, president of the Madrid Chamber of Commerce, are two of the three vice-presidents, while the third had yet to be appointed on the publication of the rules two months ago.

The members for Great Britain are: Sir Albert J. Hobson, Sir Arthur Shirley Benn, Sir Algernon F. Firth, Dr. Walter Leaf, Sir Felix Schuster, the Hon. J. G. Jenkins, Mr. A. Barton Kent, Mr. Arthur Balfour, Mr. W. Clare Lees, Mr. H. L. Symonds, Sir Henry Whitehead, and Mr. O. E. Dodington. Among the American members of the court appears the name of Mr. Owen D. Young, chairman of the board of the New York General Electric Co.

The number of members of the Executive Committee corresponds to the number of countries affiliated with the International Chamber; and the member of the court appointed to sit upon the Executive Committee by each National Committee must be resident in Paris.

THE QUESTION OF CONCILIATION

The functions of the court, whose services are available to manufacturers and traders and financiers of all countries for facilitating, as far as possible, the settlement of commercial disputes, are divided into two parts, namely, conciliation and arbitration.

In the case of conciliation, any one of the parties to a dispute may request the good offices of the Administrative Commission of the International Chamber, and the party so desiring may request the intervention of the International Chamber in writing through his national committee, submitting at the same time a copy of the contract in question, together with copies of the complete documentary record of the transaction. On the receipt of the application, and the documents in support, the chairman of the Administrative Commission will

enter into correspondence with the other part, through the national committee concerned, asking him, provided he accepts the services of the Chamber, to submit his statement of the case, supported by a complete documentary record.

The chairman of the Administrative Commission will associate with himself one or more members of the Commission depending upon the nature and importance of the case. After having rendered himself familiar with the documents submitted and having collected all possible information, the chairman, on behalf of the Commission, will communicate with the parties through their national committees, with a view to arriving at a basis of agreement acceptable to all the parties. In the event of failure to bring about a conciliation of the parties, the latter will be free to have recourse to arbitration or to submit the case to the proper courts; and nothing that has been done, said, or written in the attempt to reach a basis of conciliation shall affect their dispute in any manner whatsoever upon arbitration or before the courts.

THE ARBITRATION PROCEDURE

The rules on arbitration are divided into two sections. The first applies to cases where at least one of the parties is a national of a country which does not provide legal sanction for the execution of arbitration awards, while the second deals with cases where all parties are nationals of countries which provide legal sanction for the enforcement of awards. With the exception of two articles and one special article, the rules are exactly alike, and 18 articles are therefore common to both sections.

The court of arbitration or international committee on arbitration, as it is also termed, to which all questions connected with arbitration will be referred, will request the National Committees to furnish it with the names of technically-qualified arbitrators, as and when required for appointment as arbitrators in cases submitted, and

from among them the court will proceed to make the appointment. With the assent of both parties, the court may delegate any specific arbitration to any chamber of commerce or other organisation member of the chamber which maintains an organisation for arbitration. Whenever the parties have agreed to arbitration, the jurisdiction of the court is obligatory upon the contracting parties, and upon the refusal or failure of one of the parties to present his case before the arbitrators an award by default may be made.

It is provided that the arbitration shall take place in the country and town determined by the court, after examination of the request for arbitration and before the appointment of arbitrators; and all communications between the court, the arbitrators, and the parties concerned will be made through the medium of the national committees or the organisation members.

The court will appoint one arbitrator to try the case submitted to it, unless the parties desire either two arbitrators and one umpire, or three arbitrators. When two arbitrators and an umpire are appointed, the decision of the umpire will be binding; when there are three arbitrators the decision of the majority will be binding, or if no such majority is obtained, three new arbitrators are to be appointed to hear and determine the case afresh. Awards are to be given in a period not exceeding 60 days although the court reserves the right to extend this period as circumstances may warrant.

If possible, the arbitrators are to utilise for clerical assistance the services of the staff of the organisation members of the chamber. The arbitrators may similarly take or obtain any legal or technical advice in reference to a dispute; the remuneration of such services and any expenses connected with them will be part of the costs. The court of arbitration may require all or one of the parties to pay or deposit such a sum of money as may be deemed necessary for the payment of any fees, costs,

and expenses which may be incurred in the course of the proceedings.

It is further provided by the rules that all parties are in honour bound to carry out the award of the arbitrators. In the case of default, the court will have the right to request that the name of the defaulting party shall be published in the official publications of the International Chamber and in those of the National Committees, together with the text of the award so remaining unexecuted.

The Executive Committee of the court recommends all traders to insert the following clause in their contracts:—"The contracting parties agree to submit to arbitration, in accordance with the arbitration rules of the International Chamber of Commerce, the settlement of all disputes in connection with the interpretation or the execution of this contract."

The court is now in operation, and awards have already been made in the case of international disputes. The offices of the International Chamber are at 33 Rue Jean Goujon, Paris, where copies of the rules may presumably be obtained.

COMMERCIAL ARBITRATION AND FRENCH LAW⁶

Arbitration is regulated in France by articles 1003 to 1028 of the Code of Civil Procedure. Formerly, there was a compulsory arbitration procedure, under article 51 to 63 of the Code de Commerce, for disputes between partners in business; but this was abrogated by the law of July 17, 1856.

Arbitration detracts from our judicial organization which instituted tribunals for the settlement of disputes;

⁶ By Mr. Georges Maillard, Avocat à la Cour d'Appel de Paris; Président du Groupe Français de l'Association Internationale de la Propriété Industrielle. *International Chamber of Commerce. Digest.* No. 47. June, 1923.

but it is justified by the right which belongs in principle to each individual to adjust amicably, in whatever way he may think fit, differences which may exist, to come to terms, as provided in articles 2044 *et seq.* of the Civil Code, and subsequently to determine the conditions under which the agreement shall be arrived at. French law, however, has not recognized the possibility of arbitration being compulsory, nor the right of agreement in advance to submit a case to arbitration. That is why, after article 1003 of the Code of Civil Procedure has laid down the principle that "all persons may *compromise* as to rights of which they have the free disposal," article 1006 specifies that "the agreement to arbitrate, shall designate *the objects in dispute* and the names of the arbitrators under penalty of nullification of the agreement." Jurisprudence thereby assigns nullification to the clause under which, even in a definite contract, the parties refer to an arbitration tribunal, whose constitution they have provided for, for all disputes which may arise from the contract.⁷ This is what is meant by saying that French law does not admit the validity of the *general arbitration clause*. The arbitration clause is admitted, as an exception, in the matter of marine insurance⁸ and in the local law of Alsace-Lorraine.

A tendency, however, has shown itself for several years to admit the arbitration clause, at least in commercial matters. M. Etienne Flandin (in 1904 and in 1921), M. Louis Dreyfus (in 1907) introduced legislative proposals in this direction. More recently the Government brought forward a bill proposed by the Legislation Committee of the Ministry of Commerce for the purpose of modifying article 1005 of the Code of Civil Procedure; this bill, which prescribes anew the conditions of validity of submissions to arbitration and permits foreigners to perform the functions of arbitrator, subject only to reciprocal conditions in their own country, admits the arbi-

⁷ Judgment of the Cour de Cassation of July 19, 1843. S. 43.1.561.

⁸ Article 332 of the Commercial Code.

tration clause in commercial matters as binding on the parties who stipulated for it. Finally, in March last,⁹ M. Etienne Clémentel, Président-Fondateur of the International Chamber of Commerce, Senator, introduced a bill for the purpose of rendering legal the insertion of the arbitration clause in contracts made in France between French and foreign subjects or between foreigners.

A. GENERAL ARBITRATION CLAUSE

It will be seen from the above explanation that, for the present, although constantly used in French commercial contracts, the clause referring all disputes relative to a contract to arbitration, is not valid and the second party to the contract cannot be compelled to submit to the arbitration procedure which has been provided for, instead of bringing the dispute before the ordinary courts.

Judicial decisions in force make an exception for the case where, in accordance with the mutual wish of the parties as represented by the arbitration clause in the contracts, the dispute is to be arbitrated under the law of a country which recognizes the validity of arbitration clauses.¹⁰ The will of the parties in the matter of private contracts is really free and autonomous. In order to reach a decision on a contract with a foreigner, the French party can accept the authority of foreign courts by derogation of Article 14 of the Civil Code; he can likewise accept the authority of an arbitration tribunal validly constituted under foreign law,¹¹ but this would not be the case, according to the Havre Tribunal de Commerce,¹² for a contract between French subjects.

Under French law, a foreigner cannot invoke an arbi-

⁹ Annex to the Minutes of the meeting of the Senate, of March 13, 1923, Ordinary Session, N. 168. 1923.

¹⁰ Article by Mr. Godron in the *Revue du Droit International Privé* by Clunet. 1919, p. 654-9, and judgments cited.

¹¹ Douai, May 27, 1911 and Aix, December 18, 1913. *Revue du Droit International Privé*. 1912. p. 717, and 1914, p. 435.

¹² October 5, 1921, *Recueil du Havre* 22. 1. 77.

tration clause against a French subject in France, which provides for arbitration to be effected in France. But an arbitration clause inserted in a contract between a French and English subject for example—it is between French and English merchants that the case most frequently arises—is enforceable against a French subject to the exclusion of the authority of the French Courts as to the rights of the case, if for example the contract was signed in England¹³ or if, although the contract was signed in France,¹⁴ the arbitration is to take place in London.¹⁵

It will always be the duty of a French Court before which the question of validity of the arbitration clause has been raised to ascertain the joint intention of the parties and to decide therefrom whether the foreign law is applicable or if it is necessary to adhere to French law.¹⁶

Consequently, until the French law has been modified, the arbitration clause referring to the arbitration of the International Chamber of Commerce will not be valid in France if it is the French law which is applicable to the contract. But it will be enforceable, and the French

¹³ Cour de Cassation, January 8, 1913 *Revue du Droit International Privé*, 1913, p. 407; Tribunal Civil de la Seine, 1st. Chamber, November 16, 1922, *Gazette du Palais*, December 30, 1922.

¹⁴ Douai, May 27, 1911, *La Loi*, October 29, 1911.

¹⁵ Besançon, January 5, 1910, *Journal de Clunet*, 1910, p. 867; cf. for a contract between a German and French subject, Lyon, November 25, 1913, *Clunet*, 1914, p. 1230.

¹⁶ M. Percerou in his report presented to the Meeting of the Economic Commission of the League of Nations on July 3, 1922, states in this respect: "the situation is therefore more favourable for the arbitration clause in international law than in internal law. It is easy for a foreigner entering into a contract with a French subject to render the observance of this clause compulsory for the French subject. This is of great importance from the point of view of the commercial relations which connect one country with another."

On the other hand, Mr. John Geiderman, Representative for Holland, at the Eleventh International Cotton Congress of Stockholm, declared at the Meeting on June 14, 1922: "At present, the French Courts generally decide in favour of the validity of the arbitration clause when it is signed by a French party in a country where the clause is valid. But the procedure is very slow, uncertain and very costly. Under these conditions, the arbitration procedure, instead of simplifying the solution of disputes, only complicates and retards them. It would appear preferable to bring an action directly before the French Courts without referring to arbitration."

Courts will have to recognize the arbitration, if it arises from a contract where the parties have undertaken to submit the matter to a legislation where arbitration clauses are admitted, and if the Rules of Arbitration of the International Chamber of Commerce are in conformity with the legislation of that country. It must not be forgotten, however, that there will be questions of fact and of law, sometimes of a delicate nature, which must remain for submission to the broad judgment of the Courts.

The whole position therefore will be simplified and the parties will be able to stipulate in their contracts that all disputes shall be submitted to arbitration under the conditions provided by the Rules of Arbitration of the International Chamber of Commerce, if the bill introduced by the French Government and at present before the Senate is finally adopted. It admits the validity of the arbitration clause on condition:

1. That it contains no renunciation by the parties of the right of appeal;
2. That it does not give the power of acting as "*amiables compositeurs*" to the arbitrators in advance, by absolving them from the observance of the rules of legal procedure and commissioning them to determine the issues according to equity without conforming to the rules of law, without giving the grounds of their award and without appeal;
3. That it does not nominate the arbitrators.

If one party refuses to proceed to the nomination of the arbitrators, the appointment which he would have been entitled to make will be made by the President of the Tribunal de Commerce of his jurisdiction, or, according to one "*variante*" of the bill, the recalcitrant party will have to pay damages.

It will be noted that according to this proposal, the parties would not be able to refer to Section B of the Arbitration Rules, for article VII provides that arbitrators can render their award as "*amiables compositeurs*."

The obligation imposed by the proposal of reserving the right of appeal, would, on the other hand, remove from the arbitration of the International Chamber of Commerce a large measure of its importance if the contracting parties remained, according to their contracts, subject to French law.

These difficulties would be removed by M. Clémentel's bill. In that bill there is nothing to prevent the arbitration clause, in the case of contracts with foreign countries, from containing a renunciation of the right of appeal or from giving to the arbitrators the powers of "amiables compositeurs." The bill also provides for the subsequent appointment of arbitrators by force of right by the President of the Tribunal de Commerce, so as to enable him to impose arbitration upon parties who may have forgotten their undertaking and may wish to withdraw.¹⁷

B. THE SUBMISSION TO ARBITRATION

When the parties have signed an arbitration clause which is not valid according to French law and which they desire to honour in accordance with their signature, the simplest course for them in order to render the arbitration decision executable in France, will be to sign a submission to arbitration, conforming with the Code of Civil Procedure.

The submission to arbitration should be *in writing* and drawn up in such a way that there is no possible mistake as to the persons between which it has been made. It must be signed by each of the parties.¹⁸ The document should indicate the place of execution and the date on which it was drawn up. It should be written on stamped paper and registered. The arbitrators cannot constitute themselves as a Tribunal before this formality has been completed. The submission to arbitration should be prepared in as many copies as there are con-

¹⁷ See the Supplement to Record No. 7 of the International Chamber, "Arbitration Report," p. 5.

¹⁸ Article 1005, Code of Civil Procedure.

tracting parties¹⁹ plus one copy for the registration officer.²⁰ To be complete it must designate exactly the parties agreeing to arbitrate, and define the duties and powers of the arbitrators.²¹ Article 1004 excludes from submissions to arbitration certain kinds of disputes, namely, those which relate to persons, to gifts and to legacies of food, clothing and lodgings and all matters liable to affect and to be brought to the notice of the public Prosecutor. Also, submissions to arbitration cannot be entered into in connection with questions on which the parties are not free to deliberate or in connection with a right clearly established by law.

The contracting parties can give to their submission to arbitration whatever period of validity may be agreeable to them. If nothing is indicated in the submission to this effect, the period is fixed by article 1007 of the Code of Civil Procedure at three months from the date of the submission, exclusive of that date.

This period must be strictly adhered to and the award must be rendered and pronounced before its expiry under penalty of nullification both of the award and of the submission to arbitration.

The submission to arbitration must indicate the names of the arbitrators under penalty of nullification, or in any case, must leave no doubt as to the persons indicated as arbitrators. A submission consequently is valid which entrusts the arbitration to the Bar Association or similar body in a particular town, or to a Board of Directors, etc.

There may be one arbitrator only, or an even or uneven number may be appointed.

It is only in cases relating to marine insurance that a submission to arbitration is valid which does not bear the names or adequate indication of the arbitrators.

In their choice of arbitrators, the parties are only

¹⁹ Article 1325 of the Civil Code.

²⁰ Law of June 29, 1918, Article 14.

²¹ Article 1006 of the Code of Civil Procedure.

limited by the exceptions which are supported by considerations of public interest. It seems now to be admitted that arbitrators may be foreigners.²²

It would not be wise to choose as arbitrator the International Chamber of Commerce, for according to the Rules, its role consists not in adjudicating but in appointing the arbitrators. It is advisable that they should be chosen beforehand as provided in the Rules, and that their names should then be entered in the submission to arbitration.

The submission to arbitration can absolve the arbitrators either wholly or in part from the observance of the rules of procedure. It can instruct them to adjudicate merely in accordance with their sense of equity, without having regard to the prescriptions of the law; and it can decide that the award shall be without appeal. These three conditions taken together constitute the arbitrators are "*amiables compositeurs*"²³ and, reciprocally, if the persons called upon to settle a dispute are qualified as "*amiables compositeurs*," they will enjoy all the dispensations enumerated, and their award will be without appeal.²⁴ The "*amiables compositeurs*" are relieved even of giving the grounds for their award.²⁵ They are only compelled to give it within the period prescribed, to sign it, and to file it with the Clerk of the Court within three days of its date.

C. ARBITRATION PROCEDURE

The arbitrators receive notice of the submission to arbitration either by letter or verbally. They must satisfy themselves that the submission has been stamped and recorded and, if need be, have it regularized on both these counts. The arbitrators can naturally refuse the mandate which is entrusted to them. They may also

²² Chambéry, March 15, 1875, D. 77. 2. 93.

²³ Article 1019 of the Code of Civil Procedure.

²⁴ Cour de Cassation. December 15, 1885.

²⁵ Nancy, August 11, 1883.

accept it with the right of refusal upon examination of the submission to arbitration. This method avoids the difficulties which might result from a resignation which might otherwise be considered unduly deferred.

The appointment of an arbitrator, once made, can only be revoked by the unanimous act of all the parties and before the award is rendered. No reasons need be given for such revocation.²⁶ Arbitrators are liable to be challenged, but the challenging of arbitrators nominated in the submission to arbitration is valid only if made for motives which have arisen after the drawing up of the submission.²⁷ The objection is brought before the civil court and is subject to appeal.

The arbitrators must hear the parties at least once. It is advisable to make the parties sign the Minutes of the hearings. The parties can appoint representatives on their behalf, either under the submission to arbitration or by notification to the arbitrators. The drafting of an official report may be modified whenever it appears advisable. Minutes which have to be served on a party are submitted to the Registration Office.

An arbitrator may, at any time, resign either formally or tacitly. If this cessation of duty is not the result of *force majeure*, an action for damages may be brought against the arbitrator. His withdrawal is a serious decision, since it annuls the agreement to arbitrate.

If one of the parties admit or alleges nullification of the submission to arbitration, and brings this to the notice of the arbitrators, the latter suspend their operations and inform the other party of the fact. If the latter admits nullification, he signifies the same to the arbitrators and the agreement to arbitrate is annulled. The arbitrators have then, as in the case of revocation, the right to claim an indemnity. If there is a dispute as to the validity of the submission, the arbitration is suspended, pending the decision of a competent Tribunal.

²⁶ Article 2004 of the Civil Code.

²⁷ Article 1014 of the Code of Civil Procedure.

The parties must deposit their papers and documents in the hands of the arbitrators at least 15 days before the date on which the award should be given.²⁸

The settlement of the dispute, which must take place before the expiry of the term fixed, may be either a definite award or a compromise, or a finding that the arbitrators have failed to agree, which may or may not involve the appointment of an umpire, according to the sense of the agreement to arbitrate. This finding whilst recording disagreement on certain points, may constitute a definite decision on questions in regard to which the arbitrators were in agreement.

In case of failure to agree, the arbitrators will appoint an umpire in their minutes, if it seems advisable. They will draw up their separate opinion with their reasons, either in the same minutes or in separate minutes. Under the terms of Article 1018 the umpire must give his decision within one month from the day of his acceptance of the post unless another period has been fixed. "He shall not be entitled to give his opinion until after he has conferred with the arbitrators who are in disagreement, who must also meet for this purpose, and if all the arbitrators do not attend the meeting, he shall give judgment alone, but he must adopt one of the opinions of the other arbitrators." On the other hand the submission to arbitration may designate three arbitrators, which will avoid any failure to come to an agreement, or may provide that in case of such failure, the two arbitrators shall appoint an umpire, who will confer jointly with the other two, or that the umpire shall be entitled to give a personal opinion which differs from those expressed by the two arbitrators. Jurisprudence has even decided that, if the agreement to arbitrate has relieved the arbitrators from submitting to the rules of procedure, the umpire has full liberty to formulate his award, and, further, that the provisions of Article

²⁸ Article 1016 of the Code of Civil Procedure.

1017 of the Code of Civil Procedure do not involve the penalty of nullification.²⁹

D. THE AWARD

The award must be in accordance with the submission to arbitration, must state that the decisions represented the opinion of the majority, and must give these decisions in detail. It must at least be signed by the majority of the arbitrators within the given period, and then filed within three days of such date with the Clerk of the Court competent to enforce its execution. Failure to observe the time-limit allowed carries no penalty;³⁰ the parties may undertake to file the award and may even defer this filing by mutual agreement, provided that they relieve the arbitrators of the duty of filing their award. The submission to arbitration, the official report, and the documents attached to the award, must be recorded.

When the arbitration terminates by an amicable arrangement signed by the parties, it is not necessary to draw up an official report. The deed of compromise puts an end to the dispute, and consequently to the submission to arbitration, and to the mission of the arbitrators. But it is prudent for the arbitrators to retain the proof of the agreement arrived at.

E. EXECUTION OF ARBITRATION AWARDS

French Arbitration Awards

It is the President of the Court who assisted by his Clerk, invests the award with the formula of execution, after having examined it from the point of view of public policy and welfare, its legality and due regularity. After this the award ranks as a legal judgment.

Foreign Arbitration Awards

French jurisprudence admits, as we have seen, the validity of foreign arbitration awards under the conditions which we have pointed out.

²⁹ *Cour de Paris*. December 9, 1921; *Gazette du Palais*. January 1, 1922.

³⁰ *Cour de Cassation*. August 24, 1829.

A foreign award is submitted to an examination of form like the French award. But the question whether foreign arbitration awards should be rendered executory by the President of the Civil Court³¹ or by the Tribunal, is a matter of controversy.

In support of the latter view, it is argued that an award once invested with executory force by a foreign judicial authority, carries the authority of a judgment and that only the Courts can render executory a foreign judgment. But numerous decisions have been given in favour of the right of the President of the Court to grant an *exequatur* by decree. The Court or the President only satisfy themselves that the parties had the capacity to arbitrate under the conditions under which they have done so in conformity with the law of the country where the award was rendered, that the award is final and conclusive according to the foreign law, and that it does not disregard any principle of French or international public policy.³²

The award must be filed with the Clerk of the Court together with the original contract and all the documents cited in the award: it must be legalised by the French Consul. Further, a power of attorney must be attached thereto, also legalised, for the representative who files the award.

France has concluded special conventions with certain countries relating to the execution of arbitration awards rendered in those countries.

³¹ Article 1020 of the Code of Civil Procedure.

³² We note the following considerations from a judgment of the Civil Court of the Seine of February 10, 1922 (Hashimoto vs. Galluser & Co. and the Crédit Lyonnais);

"The complete revision of the award is permitted in regard to judgments given in a foreign country where there is no diplomatic treaty which places obstacles in the way. But whereas the judgment, which is an act emanating from a foreign public authority is vested with a validity which ceases at the frontiers of its country, the *arbitration award* which emanates from the private wishes of the parties, could not be limited in its effects to a particular territory. Hence, the Court cannot revise completely the terms of an award without disregarding the legal effects of the contract entered into between the parties and of which the arbitration award is the outcome."

Jurisprudence generally expresses itself in this sense. It must be observed, however, that in the case in question, it was stipulated that the award should be *without appeal*.

The treaty with Switzerland of June 15, 1869, Article 15, sets aside the complete revision of arbitration awards: it is the Court sitting in Council which delivers the *exequatur* which it can only refuse for reasons of public interest. Under the treaty with Belgium of July 8, 1899, Article 15, the President of the Civil Court of the district in which execution is sought, must grant the *exequatur*, provided that the Belgian award respects the French conception of international public policy, that it bears the authority of a formal verdict in Belgium, that the document containing the award is authentic and that the parties were properly represented.

Fiscal Dues

For the recording of French and Foreign awards, the following payments must be made not later than twenty days after the deposit with the Clerk of the Court:

1. On the amount of the fine, costs or apportionment, a proportional tax of Frs. 2.50%. (Minimum Frs. 9.38).

2. In case of damages, on the amount of the damages, a proportional tax of Frs. 3.75%.

3. A Stamp duty varying according to the subject of the dispute; this duty is leviable on account of legal agreements and acts *not previously established by a registered deed* and of which the award confirms the existence or constitutes the documentary evidence.

For example, in the sale of real estate, the stamp duty is 10%; for the sale of furniture, merchandise, and businesses, it is 5%.

F. MEANS OF RECOURSE

Opposition to a decree of *exequatur* must be made within a period of not more than eight days at maximum from the moment when this order was notified by the party who is most anxious for a settlement.³³ It operates as a stay of execution.

³³ Article 449, Code of Civil Procedure.

Such an application can only be based on the fact that the arbitrators have exceeded their powers or on the irregularity of the award.

The parties can attack the award by means of a *requête civile* (petition in a civil court) by an appeal within two months of the notification being made to them of the decree of *exequatur*.⁸⁴ If the arbitrators are nominated as "amisables compositeurs," this term implies the renunciation of the right of appeal, but not the renunciation of the right to make a *requête civile*.

A *suit* cannot be brought against the arbitrators, but they may be the subject of a claim for damages based on a serious fault and particularly on any refusal of justice for which they may be responsible, if the award was not rendered within the fixed or legal period.

INTERPRETATION BY FRENCH COURTS

"HASHIMOTO C/ GALLUSSER ET CIE ET LE CREDIT
LYONNAIS"⁸⁵

"By charter-party signed at London June 24th, 1916, the defendants, Gallusser et Cie, chartered the ship 'Shigizan-Maru' from the plaintiff for the purpose of transporting Chinese coolies to France.

"The charter-party having contained provisions for the settlement of disputes arising thereunder by Arbitration in England, and the plaintiff claiming damages for break of contract against the defendants, the case was submitted to Arbitrators in England, who made an award in favour of the plaintiff.

"The plaintiff then brought action in France to obtain the *exequatur* of this award for the purpose of enforcing it there.

"It was argued on behalf of the defendants that as no special treaty existed between France and England with

⁸⁴ Article 444, Code of Civil Procedure.

⁸⁵ Annual Report, Committee on Arbitration, Chamber of Commerce, State of New York. May 3, 1924. p. 9.

regard to the executory effect to be given to English judgments, and as in the absence of such Treaty the French Court had a right to inquire into the merits of the case and if it saw fit to revise the terms of the judgment before granting its exequatur, so in the case of an Arbitrator's award, the Court might review the whole matter and revise the terms of the award which the defendants accordingly pleaded it should do.

"The Court however held that an award of Foreign Arbitrators differs essentially from the judgment of a Foreign Court of Law.

"A judgment of a Court of Law being an act of the public authority is limited as to its effect to the territory within which that Court exercises its jurisdiction.

"An Arbitrator's award, on the contrary, is the result of the mutual agreement of the parties to submit the decision of the points at issue between them to a person or persons of their own choice, and its effect is therefore not limited to any particular territory.

"This being so the Court held that to enter into the merits of the case or to revise the award of the Arbitrators would be to ignore the legal effects of the contract entered into between the parties:

"It further indicated that the only conditions to which the validity of an award by Foreign Arbitrators was subjected in France were:

(a) That the parties to the contract had the capacity required by the *lex loci contractus* to effect a compromise of their rights.

(b) That the award was made in accordance with the Law of the country where the Arbitration was held.

(c) That the award was not contrary to French public order. (Art. 83. C. pr. civ.)"

* * *

According to Arbitration Report No. 5 (December, 1925) of the International Chamber of Commerce of Paris, on December 8, 1925, the French Senate passed an Act making valid and enforceable arbitration clauses contained in commercial con-

tracts. This bill had been pending in the French Legislature since July 2, 1908, when it was passed by the French Chamber of Deputies. This accomplishment supplements the legal decision of the French Courts admitting "the validity of the arbitration clause signed with a foreigner, whenever the contract had been signed abroad or referred to a foreign law which recognized the validity of the clause."

The following quotation describes the attitude of the French Courts:

"A judgment pronounced in a foreign country in an act emanating from a foreign public authority, vested with a validity which ceases at the frontiers of its country. An arbitration award emanates from the private will of the parties and cannot be limited in its effects to a particular territory."

COMMERCIAL ARBITRATION IN BELGIUM⁸⁶

The Belgian Code Civil covers the subject of arbitration fully. It stipulates that where no court clause covers arbitration of a commercial dispute settlement by this method is voluntary for the parties concerned. Arbitration awards are upheld by the court almost without exception.

Contract for the disposal of goods as between Belgian and the United States or most other foreign countries is generally conveyed in the form of a letter. Many establishments insist upon the insertion in correspondence of clauses providing for arbitration difficulties which may arise. Where the question of arbitration of possible disputes is specifically covered in contract or correspondence, it is customary to mention the place where the arbitration shall be held, as well as the body to which the arbitration shall be confined. Where no such clause exists, however, and a disagreement arises—especially in cases involving the condition of arriving merchandise—the question may either be carried directly to an appropriate arbitration board (*chambre arbitrale*) in the port where the merchandise arrives or is sold, or the *tribunal de premiere instance* (tribunal of first instance) may be requested by the parties to the transaction to appoint an

⁸⁶ By H. S. Fullerton. *Commerce Report*. Washington, D.C. September 22, 1924. p. 729.

arbitrator to hear the question and to give decision on it, sitting in concert with a representative of each of the two disputants. The tribunal of commerce (tribunal de commerce) which is distinct from the Chamber of Commerce in each community, has nothing to do with arbitration procedure except in an advisory way.

SYNDICATES HAVE OWN ARBITRATION BOARDS

Many syndicates, comprised of firms and individuals interested in specific commodities, exist in most large Belgian cities. Each syndicate has its own arbitration board (*chambre arbitrale*), the members, usually three in number, being selected to sit upon specific cases which are brought up for consideration. One represents the producer or manufacturer of the commodity under discussion; another a dealer or retailer; and the third an importer or commission agent. This normal order is naturally subject to variation, according to the commodity under discussion and the attendant circumstances. Thus various syndicates supporting these arbitration boards are completely autonomous and do not answer to the Chamber of Commerce to the tribunal of first instance for the decisions rendered.

The expense and time involved in commercial arbitrations inevitably vary according to the complexities of the cases under consideration. Arbitrations which have been made through arbitration boards of the syndicated commodity organizations in Belgium, or by a member directly appointed by the tribunal of first instance at the request of the contracting and disputing parties to an agreement, have been known to take as short a time as two or three weeks. It is more usual, however, for these arbitrations to consume a longer period. The law fixes three months as the maximum term. The expenses involved vary considerably, 200 francs being mentioned as average.

The problem of the enforcement of awards by arbitration boards in Belgium hinges upon the character of

the agreement made by the parties to the transaction. If there is no provision for arbitration, they may carry the case before the tribunal of first instance in the appropriate city, requesting an arbitration, or, more usually, the arbitration may be requested by the parties before the arbitration board of the appropriate syndicate (if such exists). The award rendered by the arbitration board of the syndicate is given great weight in the event that the case is appealed, but an arbitration which is effected directly through the agency of the tribunal of first instance carries with it, naturally, a great deal more weight in the event that legal proceedings result. Exception to an arbitration award made by a board constituted under the direction of the tribunal of first instance may cause the case to be carried to the *cour d'appel* (court of appeal). Here it is in process of litigation, of course, although the decision of the arbitration board in Belgium carries great weight in all legal proceedings which may be resorted to by the dissatisfied party to the award.

The American Belgian Chamber of Commerce, situated at 48 Rue de Naples, Brussels, has a committee upon laws and arbitrations and is prepared to assist in the arbitration of commercial disputes in so far as it is able. American consular officers also are always glad to be of assistance. Their mediation, however, is of a friendly character and is made available at the request of the American firm involved.

GERMAN DANISH COMMERCIAL ARBITRATION AGREEMENT ³⁷

Between the "Industrie und Handelstag" of Berlin and the "Industrietag" of Copenhagen there has recently been conducted an agreement providing for the settlement by arbitration of commercial controversies which may arise from violations or opposing interpretations of contracts entered into by German and Danish business interests.

³⁷ Memorandum prepared by Consul Rudolph E. Schoenfeld. Berlin. May 20, 1924.

The "Industrie und Handelstag," it will be recalled, is an organization in the nature of a central Chamber of Commerce for all Germany and the "Industrietag" holds a corresponding position in Denmark.

TENOR OF THE AGREEMENT

The agreement provides that disputes shall be settled by an arbitration board which will be composed of individuals appointed for that purpose by the organizations mentioned above, whenever the board has been granted jurisdiction through a clause specifically providing therefor in the original contract or through an agreement subsequently entered into by both parties. This must be in written form.

The arbitration court which will consist of three members, a presiding judge and two arbiters, will convene in the country of the defendant. One of the arbiters will be a German national, the other, a Danish national, and the presiding judge will be chosen from the country in which the court sits.

Separate lists shall be drawn up in each country giving the names of individuals who may act as presiding judges and of individuals who may act as arbiters. Only judges of Superior Courts may be included on the list of presiding judges, whereas the list of arbiters shall be composed of persons engaged in commerce or trade, grouped according to occupation. In this manner it is hoped to secure the judgment of men who will be guided not merely by legal principles but by considerations of the special economic problems involved.

The arbitration board shall first make an effort to effect a compromise between the opposing parties, and a compromise thus arrived at is as effective as an award. Should the effort at compromise fail, the board shall immediately be transformed into an arbitration court and shall then decide the controversy "in a reasonable manner and with due appreciation of all the interests involved." An award must be made within a period of four weeks.

STATUS OF ARBITRATION AWARDS

In response to an inquiry as to the binding force of the arbitration courts' awards, the "Industrie und Handelstag" of Berlin states that they will be fully recognized by the law in both Germany and Denmark. Section 1040 of the German Civil Code provides that an award of this nature shall enjoy the same validity as a legal judgment. An analogous situation exists in Denmark. Furthermore, the award is enforceable in both countries in exactly the same manner as a legal judgment.

PRECEDENTS

The arbitration agreement concluded in March, 1921, between the Duisburg Chamber of Commerce and the Netherlands Chamber of Commerce for Germany has been taken as a model in the present instance. The principal point of difference lies in the fact that in the original German-Dutch agreement it was provided that individuals who might act as presiding judges should be chosen from lists composed of eminent jurists or economists, whereas in the present instance they are to be chosen from lists composed of judges of the superior courts of the two countries.

It is stated that the German-Dutch agreement has produced most satisfactory results, 800 cases having been adjusted by compromise and 100 cases by arbitration during 1922-23 and considerable optimism exists in German-Danish business circles of a speedy settlement of a large amount of litigation growing out of the inflation period.

THE AGREEMENT

(Translation)

SECTION I

For the purpose of settling out of court controversies which may arise from agreements entered into between German and Danish tradesmen and merchants, there shall be established special arbitration boards, which shall have jurisdiction, instead

of the regular law courts, provided, however, that a clause is inserted in the contract expressly granting such jurisdiction or, in the absence of such a clause, that agreement in writing is subsequently made giving the arbitration board jurisdiction. These boards shall handle claims arising from alleged violations of contracts or other agreements and shall be competent to decide upon their interpretations.

SECTION 2

The arbitration board shall first make an effort to effect a compromise between the opposing parties. Should this fail, its jurisdiction as an arbitration court shall be forthwith recognized and it shall immediately enter upon its functions. The court shall decide the controversy in a reasonable manner and with due appreciation of all the interests involved.

SECTION 3

If the plaintiff is a German national, the seat of the court shall be in Denmark; if a Danish national, the seat shall be in Germany. The actual spot where the court shall be is left to the discretion of the court having jurisdiction.

SECTION 4

The arbitration court shall consist of three members, a presiding judge and two arbiters. One of the arbiters shall be a German and the other, a Dane. There shall also be a referee and a secretary. Separate lists of persons shall be drawn up giving the names of individuals who may act as presiding judge of the arbitration courts and of individuals who may act as arbiters. On the lists of presiding judges there may be included only judges of the superior courts of the respective countries. They shall also be informed of the legal practices of the other state.

In the list of arbiters of each country there shall be included only persons engaged in commerce or trade, grouped according to occupation, in order that the individuals who may be chosen shall not only be informed of the general commercial and trade situation, but shall possess the necessary special knowledge to form a judgement in the case under consideration. The lists of prospective German chairmen and arbiters shall be drawn up by the Deutsche Industrie und Handelstag of Berlin. The lists

of prospective Danish chairmen and arbiters shall be made by the Industrierat in Copenhagen. From these lists each party shall choose an arbiter of his own country and the arbiters thus chosen shall agree between themselves upon a chairman, who, however, must be chosen from the list of the country in which the arbitration court convenes. If they are unable to agree upon a chairman, it shall be decided by lot which one shall have the right to name him.

Each party to the case must name an arbiter within fourteen days after receipt of notification to do so. If one party fails to comply with this requirement in time, the right of nomination shall be forfeited to the opposing party. The decision of the arbitration court shall be decided by majority vote and the judgment shall be capable of immediate execution. Both parties to the controversy are pledged to accept the arbitration court's award and to renounce all right of appeal.

SECTION 5

The Deutsche Industrie und Handelstag must communicate the lists containing the names of prospective presiding officers and arbiters to the Danish Industrierat, and vice versa. The organization of one country may oppose the inclusion of any individuals figuring on the lists of the other, within two months of the date of communication. At the expiration of that period a chairman or arbiter may be removed from a list only in the event of violation of the German or Dutch civil law.

SECTION 6

The secretary of the arbitration court convening in Germany shall be appointed by the Deutsche Industrie und Handelstag and the secretary for the arbitration court convening in Denmark shall be appointed by the Industrierat. The secretary shall keep the minutes of the court's sittings and take care of outside matters of the court, especially, the correspondence with the parties involved in cases coming before the court and with the arbiters and presiding judges of the court. He shall also endeavor to effect a systematic and uniform method of handling such cases.

SECTION 7

The courts shall follow the usual governing arbitration procedure of the country in which the court is being held. The

award of the court must be made at the earliest possible moment and not later than four weeks after the date of taking up the question, and it shall fix the amount of expenses and salaries of the court to be paid by each party. To cover probable expenses it may require a sufficient deposit from both parties to a controversy.

THE LEAGUE OF NATIONS PROTOCOL ON COMMERCIAL ARBITRATION²⁸

SCHEDULE

PROTOCOL ON ARBITRATION CLAUSES

The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in

²⁸ This Protocol governing arbitration clauses in agreements was completed in 1923 by the Economic Section of the League of Nations. In August, 1924, the British Parliament passed an act making this Protocol effective in Great Britain.—*Editor*.

accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of

the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

ARBITRATION CLAUSES (PROTOCOL) ACT, 1924 (GREAT BRITAIN)
CHAPTER 39

An Act to give effect to a Protocol on arbitration clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three. [7th August 1924.]

Whereas, At a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three, the protocol on arbitration clauses set forth in the Schedule to this Act was signed on behalf of His Majesty:

And whereas for the purpose of giving effect to the said protocol it is expedient that the provisions hereinafter contained shall have effect:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same as follows:—

1.—(1) Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in the pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings.

(2) This section, in its application to Scotland and Northern Ireland shall have effect as if the reference to the Arbitration Act, 1889, were omitted therefrom, and in the application of this section to Scotland references to staying proceedings shall be construed as references to sisting proceedings.

2.—This Act may be cited as the Arbitration Clauses (Protocol) Act, 1924.

SUGGESTED TREATY ON COMMERCIAL
ARBITRATION³⁹

The Government of the United States of America and the Government of....., being desirous of facilitating commerce and trade between the two nations by validating and making enforceable agreements for arbitration of commercial disputes between the citizens or subjects of each of the high contracting parties, have authorized the undersigned, to wit, Secretary of State of the United States, and..... to conclude the following agreement:

ARTICLE I

A provision in a written contract between the citizens or subjects of each of the high contracting parties to settle by arbitration a controversy thereafter arising or a submission hereafter entered into of an existing controversy between such citizens or subjects shall be valid, enforceable and irrevocable, save only upon such grounds as exist at law or in equity for the revocation of any contract, and shall be so treated by the courts of the high contracting parties.

ARTICLE II

The awards of any board or tribunal of arbitration duly and regularly made within the territory and possessions of either of the high contracting parties shall be entitled in all the courts of the other high contracting party to full faith and credit; and shall not be open to attack save upon the ground of fraud, bad faith, failure to receive pertinent evidence offered, miscalculation of amount, or misconduct on the part of the board or tribunal making the award.

ARTICLE III

The high contracting parties will confer suitable jurisdiction upon their courts, respectively, to furnish adequate and appropriate relief in the enforcement of arbitration agreements and awards, and will establish appropriate methods and machinery

³⁹ From Annual Report, Committee on Arbitration, Chamber of Commerce of New York, May 4, 1922, p. 11-12, 14. The International Chamber of Commerce (Brochure No. 40, "Resolutions Passed at Third Congress, Brussels, June, 1925) urged on the League of Nations the advocacy of international commercial arbitration treaties.—*Editor*.

for the performance of such agreements and the enforcement of such awards.

ARTICLE IV

The citizens or subjects of each of the high contracting parties shall enjoy in the territories and possessions of the other the same protection as native citizens or subjects of the nation most favored in respect to the validity, irrevocability and enforceability of arbitration agreements, submissions and awards.

ARTICLE V

The present Agreement shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by..... and it shall become effective upon the date of the exchange of ratifications, which shall take place at Washington as soon as possible.

Done in duplicate in the English and.....language at Washington this.....day of....., one thousand nine hundred and twenty-two.

FEDERAL LAW AND TREATIES MAKING COMMERCIAL ARBITRATION AGREEMENTS BINDING URGED

At the regular monthly meeting of the Chamber of Commerce of the State of New York, held December 1, 1921, the following report and resolutions, submitted by the Committee on Arbitration, were unanimously adopted:

To the Chamber of Commerce:

With a view to making the system of arbitration in trade disputes within this country and with foreign countries more universal, effective, expeditious and economical, a conference was held, November 15th, at the Department of Commerce in Washington. Executives representing fifteen different trade organizations, enumerated on the annexed list, were present. The Chairman of your Committee on Arbitration was elected Chairman of the conference. The Honorable Herbert Hoover, Secretary of Commerce, addressed the conference, giving his views on the subject. After thoughtful deliberation, the following preamble and resolutions were unanimously adopted, and it was further resolved that those present should seek approval of this action by their respective organizations:

"Whereas, All merchants doing an interstate and foreign business seek a method whereby disputes arising in their daily business transactions can be speedily, economically and equitably disposed of; and

"Whereas, Arbitration offers the best means yet devised for an efficient, expeditious, and inexpensive adjustment of such disputes; and

"Whereas, The arbitration laws of the various States of the Union are not in uniformity and often even in conflict; and

"Whereas, The laws of any given State are not applicable in other states;

"Therefore, be it Resolved:

"First.—That the Department of Commerce urge all Chambers of Commerce and other business organizations, not only in this country, but in foreign countries as well, to create Arbitration, Mediation, and Conciliation Committees in their respective organizations for the handling of business disputes.

"Second.—That the Secretary of Commerce be urgently requested to use his best endeavors in aiding in the passage of a Federal law making arbitration clauses, voluntarily entered into, in written contracts valid, enforceable and irrevocable.

"Third.—That the Secretary of Commerce urge the Secretary of State to negotiate at the earliest possible moment:

"1st.—Treaties with foreign countries with which our country does business which shall provide that arbitration agreements in commercial contracts made between their respective nationals shall be valid, enforceable and irrevocable.

"2nd.—That such treaties contain provision for reciprocal enforcement of such arbitration agreements by the courts in the countries party to the treaties.

"3rd.—That in such treaties it be covenanted that reciprocally, arbitration decisions in the countries party to the treaties be honored and enforced.

"4th.—That such treaties provide that arbitration agreements in foreign trade bind the American merchant when they are equally binding upon the foreign merchant in his country."

APPENDIX A

ARBITRATION FORMS¹

Recent arbitration laws provide that certain technical requirements must be complied with in order to make an arbitration agreement and the award valid, irrevocable and enforceable. The forms which follow are based on, and have been found to meet, the requirements of the New York State Arbitration Law:

FORM A

AMERICAN ARBITRATION ASSOCIATION

and

SUBMISSION TO ARBITRATION

A claim, demand, dispute, controversy, difference or misunderstanding between the undersigned having arisen, relating to a subject matter the nature of which, briefly but completely stated, is as follows:²

We do hereby voluntarily submit the same and all matters concerning the same to an arbitrator of the (*specify* "American Arbitration Association, Inc.," or any other organization) for hearing and decision pursuant to the Rules adopted by the (*specify* "American Arbitration Association, Inc., or by its Arbitration Committee," or any other organization) and pursuant to (*specify* "The United States Arbitration Act," "The New York Arbitration Law," or any other State arbitration law that may apply); and we agree to

¹ From *American Arbitration Association. Bulletin*. March, 1926.

² NOTE: State here clearly and concisely the exact issues in dispute.

the above instrument, who, being duly sworn by me, did for himself depose and say that he is a member of the firm of
a co-partnership consisting

of himself and

and that he executed the foregoing instruments in the firm name of _____ and that he

had authority to sign same, and he did duly personally acknowledge to me that he executed the same as the act and deed of said firm of _____ for the

uses and purposes mentioned therein.

State of _____ }
County of _____ } SS.:

On this _____ day of _____ 192____, before me
personally came and appeared

to me known and known to me to be the person who executed the foregoing instrument, who, being duly sworn, did depose and say that he is an officer, viz.: the

of the above-named corporation and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that he is duly authorized to sign and seal the said instrument in behalf of the said corporation by the authority of its Board of Directors and said

acknowledged said instrument to be the free act and deed of said corporation.

State of _____ }
County of _____ } SS.:

On this _____ day of _____ 192____, before me
personally came and appeared

to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly personally acknowledged to me that he executed the same.

State of _____ }
County of _____ } SS.:

On this _____ day of _____ 192____, before me
personally came and appeared

to me known and known to me to be the person who executed the above instrument, who, being duly sworn by me, did for himself depose and say that he is a member of the firm of

a co-partnership consisting of himself _____ and that

SELECTED ARTICLES

he executed the foregoing instrument in the firm name of _____ and that he had authority to sign same, and he did duly personally acknowledge to me that he executed the same as the act and deed of said firm of _____ for the uses and purposes mentioned therein.

FORM C

AMERICAN ARBITRATION ASSOCIATION

In the matter of the
Arbitration between :
and

OATH of
ARBITRATOR

State of _____
County of _____

} SS.:

being duly sworn deposes and says that he will faithfully and fairly hear and examine the matters in controversy between the above-named parties in accordance with the agreement of submission heretofore duly executed and acknowledged by them, and dated the _____ day of _____ 192 , and that he will make a just award according to the best of his understanding.

.....
Arbitrator

Sworn to before me
this _____ day of _____ 192 .

FORM D

AMERICAN ARBITRATION ASSOCIATION

In the matter of the
Arbitration between :
and

FINDINGS and
AWARD of
ARBITRATOR

The undersigned constituting the duly authorized arbitrator designated in the submission to arbitration duly executed and acknowledged and dated the _____ day of _____ 192 , to whom were voluntarily submitted matters in controversy be-

tween the parties above-named, and having been duly sworn according to law and having duly heard the proofs and allegations of the disputants, does hereby make this his FINDINGS and AWARD, as follows:⁸

Dated,

County of

State of

{ SS.:

On this day of 192 , before me

personally came and appeared

to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly personally acknowledged to me that he executed the same.

³ NOTE: Insert here the essential "findings"; then state the award clearly, completely, succinctly and without indefiniteness or ambiguity, specifying the amount to be paid (with interest, if any), the action to be taken, etc.

APPENDIX B

RULES

of the Arbitration Committee of the American Arbitration Association

The object of arbitration is the speedy and inexpensive determination of controversies in conformity with existing arbitration laws. As the statutes do not detail sufficiently the procedure to be followed, it is usually desirable for the parties to agree in advance that the arbitration shall proceed in accordance with certain specific rules. The American Arbitration Association has adopted the following rules of procedure, which have heretofore been found generally applicable and enforceable under the New York State Arbitration Law:

I. Appointment of Arbitrators. The parties may agree upon one or more arbitrators. The Arbitration Committee of the Association will select designate and appoint one or more arbitrators at the request of both the parties, or where such arbitration is had pursuant to their previous written agreement providing for arbitration in case of dispute and they fail to agree upon the arbitrators when so requested by either of the parties.

II. Chairman. If three or more arbitrators are chosen, the parties shall designate one of them as chairman. If not so designated by the parties, the chairman shall be designated by the Arbitration Committee of the Association.

III. Vacancies. The Arbitration Committee shall have power and authority to declare the position of any arbitrator vacant by reason of sickness, death, resignation, absence, disqualification, neglect, refusal, or inability to act, and any such declaration of vacancy by the Arbitration Committee shall be final, conclusive and binding on all the parties. Vacancies shall be filled in the manner provided for by these rules for original appointments. Upon appointment of any new arbitrator he and the remaining arbitrators shall meet and agree as to the manner of conducting and proceeding with the arbitration in view of the substitution of arbitrator; but if the arbitrators fail, neglect or refuse

to agree, within such time as the Arbitration Committee may deem reasonable, then the Arbitration Committee shall make a rule or order in accordance with which the arbitrators shall proceed; and such rule and order shall be final, conclusive and binding on all the parties.

IV. Submissions. All submissions shall be executed in triplicate, in form provided by law, and one of these shall be filed with the Clerk of the Arbitration Committee, duly acknowledged before a notary public or other authorized official as required by law. Where a submission is not signed by the principal, the Arbitration Committee may require such proof of the authority of the person signing on behalf of the principal, as the Arbitration Committee shall deem necessary or proper, e. g.:

(a) If signed by an agent, the original or a duly authenticated copy of his power of attorney;

(b) If signed by one or more partners, the written consent of co-partners not signing the submission;

(c) If signed in behalf of a corporation, a duly certified copy of the resolution authorizing the submission.

V. Right of Privacy. The hearings shall be private, unless otherwise directed by the Arbitration Committee. Such direction must be made when requested by the parties. The members of the Committee may be present at the hearings. The testimony shall not be open to others than the parties, except upon the written order of a member of the Committee, unless otherwise required by law.

VI. Hearings. The hearing of cases shall commence as soon as practicable after submission and shall be pressed to speedy termination.

A stenographic record of the testimony and proceedings shall not be made and is hereby waived, unless it is expressly demanded or required by a party

VII. Attorneys. Either party, if he so desires, may be represented upon the arbitration by an attorney duly admitted and licensed to practice law. In that event, such attorney shall file a notice of his appearance with the Clerk in the usual form, and thereupon all notices to and service of papers upon such attorney made (in like manner as service upon an attorney in an action) shall have the same force and effect as though given to or served upon said party.

VIII. Evidence. While the arbitrators are not bound by the legal rules of evidence, they should exclude matters obviously unrelated which are time-consuming and becloud the issue; but all evidence bearing upon the case should be freely admitted.

Hearings not being confined by the strict legal rules of evidence, liberality of procedure is to be observed and such methods are to be followed as will be best calculated to elicit all the evidence pertaining to the case and at the same time meet the convenience of the parties.

IX. Conciliation. The spirit of conciliation should guide the arbitrators in their conduct of the proceedings and they should endeavor to remove all doubts and misunderstandings between the parties so as to effect if possible a meeting of their minds.

X. Awards. In case an award seemingly becomes necessary, the arbitrators ought, whenever they deem it expedient, with the view of promoting a better understanding between the parties, express their reasons for the intended award. The award in its form should be definite, certain, complete and unambiguous. Each party to the arbitration shall be entitled to a copy of the award. When not otherwise provided by the terms of the submission the arbitrators shall make their award within ten days after the final hearing, unless within that time they or a majority of them give written notice to all parties naming an extension of time for making the award, and further extensions may be similarly ordered thereafter; provided, however, that the aggregate number of days for which such extensions may be made shall not exceed thirty, except by written consent of all parties or upon the written order of a member of the Arbitration Committee.

XI. Clerk's Duties. An Assistant Secretary of the Association shall be ex-officio the Clerk of the Arbitration Committee. His duties as such are as follows: he shall receive and file all submissions and all copies of awards; give notice of all hearings; keep a record of all cases, and keep such other books and memoranda as the Committee shall from time to time direct; render all necessary assistance to the arbitrators; attend to their clerical work; and receive and disburse all deposits and costs and keep careful and accurate account thereof under the supervision of the Arbitration Committee; and shall perform all other services incident to his office.

XII. Deposit. The parties to the submission shall each deposit with the Clerk at the time of filing the submission such reasonable sum, if any, as he may deem requisite, and thereafter such further reasonable sums as the Committee may deem necessary, which shall be disbursed for the account of the parties in payment of arbitrators' and stenographers' fees, if any, and for all other necessary expenses.

XIII. Arbitrators' Fees. Where an arbitrator, registered with the Association to serve without compensation, is designated, there will be no fee.

Where an arbitrator, not so registered with the Association, is designated, a fee will be paid to the arbitrator by the parties to the controversy. The amount of this fee, and the conditions of its payment (whether by the party in whose favor the award is found or the party against whom the award is made, or by each of them in shares regardless of the nature of the award), will be arranged between the arbitrator (or arbitrators) and the parties to the controversy at the time of the submission, and can only be changed thereafter by their mutual consent. The Association will, as a measure of service to all concerned, conduct the negotiations and prepare the necessary written stipulation to be signed by the parties to the arbitration. In the event that such an arrangement is not entered into, the amount of the fee shall be fixed by the arbitrator but, if deemed unreasonable by the parties, the decision of the Arbitration Committee shall, in all respects, be binding and conclusive.

XIV. Contingencies. In case of difference as to procedure or any matter not expressly covered by these rules, or in the event of any misunderstanding or question concerning their interpretation or application, the determination of the Arbitration Committee, not contrary to express provisions of law, shall be binding and conclusive upon the parties.

XV. Construction of Rules. The arbitrators shall construe these rules and regard the submission to them as being designed to secure justice and equity in the shortest possible time, with a minimum of expense, and above all, if possible, to obviate or, in any event, minimize the annoyance, irritation and bad feeling which often exists or is engendered between disputants.

XVI. Definitions. Wherever the word "party" or "parties" is used in these rules, it shall refer to the parties to the submission, and wherever the word "arbitrator" or "arbitrators" is

used it shall refer to the arbitrator or arbitrators, as the case may be, whether there are one or more. Wherever the word "Committee" is used, it shall refer to the Arbitration Committee of the American Arbitration Association, Inc. Wherever the word "Association" is used, it shall refer to the American Arbitration Association, Inc. Wherever the word "Clerk" is used, it shall refer to the Clerk of the Arbitration Committee.

XVII. Special Rules. The Arbitration Committee may, wherever it deems it appropriate or necessary so to do, adopt special rules applicable to any particular business, trade or profession or to any particular business, trade, professional or other association; and in case of conflict or inconsistency between such special rules and the general rules, the special rules shall prevail.

XVIII. Amendments. The Arbitration Committee shall have full power to amend, alter, repeal, add to or omit any of these Rules from time to time as may be found expedient.

XIX. Facilities. The Association will provide the parties with adequate rooms, all the necessary forms and papers and stenographic and clerical service at cost and without profit and will endeavor to do, or cause to be done, everything it properly can do for the purpose of assisting the parties in reaching a speedy, economical, harmonious and just determination of the matter in dispute.

Adopted by the Board of Directors of the American Arbitration Association, Inc., February 9, 1926.

APPENDIX C

ARBITRATION CLAUSES IN CONSTRUCTION CONTRACTS

The following arbitration clauses in engineering contracts are of special interest in that they represent another step forward in commercial arbitration. The first clause is from the contract made by the Port of New York Authority (created by compact between the states of New York and New Jersey, ratified by Congress) for the steel superstructure of the Outerbridge Crossing over the Arthur Kill between Perth Amboy and Tottenville.

Writing the editor of this Handbook, Mr. Kenneth Dayton, who assisted Mr. Julius Henry Cohen of New York City, general counsel of the Port Authority, in drawing up the contract, states that in all probability this clause is unique because of the situation which it was drafted to meet. The Port Authority is a public corporation. As such its rights and liabilities are to some extent determined by rules of law entirely different from those relating to private contracts. Moreover, the Port Authority itself differs from the ordinary municipal corporation and its rights and liabilities as a public corporation are in some degree peculiar. Accordingly, it was deemed improper to leave questions of law to the determination of lay arbitrators who might not appreciate the peculiar statutory rights and rules applying to this contract, but desirable that questions of fact arising in the performance of the contract should be the subject of expert determination by individuals experienced in those particular issues. So far as questions of law were concerned, however, it was endeavored not to make these the subject of protracted litigation but to have them determined as expeditiously as the questions of facts.

While the clause was drafted to apply to a unique situation, it is suggestive of a scheme for distinguishing between the determination of questions of fact and of law. Many times parties would like expert decision upon questions of fact, but are loath to surrender their legal rights in relation to the construction of contracts and rights and duties thereunder. It seems that the plan of this clause could be modified to apply to private contracts.

CLAUSE IN CONTRACT OF NEW YORK PORT AUTHORITY¹

40. AVOIDANCE OF LITIGATION; ARBITRATION.

In the event of a dispute concerning the legal rights or liabilities of the parties hereunder or either of them, the parties agree to facilitate the determination of such dispute by means of a declaratory judgment of the court under the laws of the State of New York, or by submission of an agreed statement of facts to an appropriate court, or otherwise, and in good faith to reduce the cost and delay of litigation by proceeding diligently.

As to any difference between the parties where the judgment of the Engineer is not conclusive upon such question, all such differences which present questions of fact shall upon the demand of either party be submitted to arbitration in accordance with the method hereinafter provided. But no claim of arbitration or action hereunder by either party, including submission thereto, shall prejudice either of the parties with respect to any claim it or they may make in regard to the proper legal interpretation of the Contract or the determination of their legal right or liabilities hereunder, and determination of any question of fact by arbitration hereunder shall be subject always to the determination of the legal rights or liabilities of the parties under this Contract by a court of competent jurisdiction. If either party disputes that a difference of fact exists which is submissible to arbitration under this Contract and such claim shall be presented to a court upon a motion to compel

1. Chap. X, p. 37-9, par. 40.

the arbitration to proceed, then the parties waive their statutory rights to claim a trial by jury of any of the issues involved in such proceeding. Neither party shall be bound to present such contention prior to the arbitration, but by an appropriate statement made to the arbitrators, may reserve such question for presentation and consideration upon a motion to confirm, vacate or modify the award rendered, and upon such motion either party may ask the court to determine any question of law relating either to the duty to arbitrate the issues presented to the arbitrators, or the legal rights and liabilities of the parties in relation to such issues. The award of the arbitrators shall, at the request of either party, be stated in such form that it presents the facts found upon the issues in dispute, and may thereupon be used for all purposes as an agreed statement of facts between the parties. It shall also state any questions of law reserved by either party at the commencement of the arbitration for the consideration of the court.

Anything to the contrary contained in this clause notwithstanding, a dispute over a question of fact referable to arbitration under this clause shall in no way prejudice or hinder the right of the Port Authority to take any action whatsoever permitted to it under the clause entitled "REMEDIES OF THE PORT AUTHORITY FOR BREACH OF CONTRACT," but the Port Authority may take such action as though this clause were non-existent and such question of fact may thereafter be submitted to arbitration. If the decision of the arbitrators is against the contention of the Port Authority, and if the arbitrators or the court within their respective jurisdictions under this clause shall decide that the Port Authority had no right to take the action which it did take, then there shall be determined by the arbitrators the amount of any damages which the Contractor has suffered by reason of such unwarranted action. The intent of this clause is that the prompt and uninterrupted construction of the bridge of which this work is a part is a public necessity, with the duty of accomplishing which the Port Authority is charged, and accordingly it must have entire freedom in the accomplishment of such object in accordance with the judgment of its Engineer, without any power on the part of the Contractor to delay it by legal proceedings, subject, however, to the payment of damages for action which it was not entitled to take.

In any case covered by this clause, either party may demand arbitration by serving a notice upon the opposing party to proceed as hereinafter prescribed within three business days after service of such notice. Subject to the provisions of this clause, the arbitration shall proceed under and pursuant to the rules of the Committee of Arbitration of the Chamber of Commerce of the State of New York, if said Committee will accept the same, the parties certifying and agreeing that they have read and are familiar with the said rules. The dispute shall be heard before three arbitrators, to be competent and qualified engineers experienced in matters of the nature covered by this Contract and preferably taken from among those listed as "Engineers" or "Consulting Engineers" in the "List of Official Arbitrators" of the Chamber of Commerce. The parties shall, if possible, agree upon said arbitrators. If they cannot agree, the arbitrators shall be named by the Committee on Arbitration of the Chamber of Commerce. If said Committee refuses to accept jurisdiction of the dispute as herein provided and the parties cannot agree upon the three arbitrators, then such arbitrators shall be appointed by the Chief Judge for the time being of the Court of Appeals of the State of New York, or in default of his action, by any other Judge of the Court of Appeals to whom the parties or either of them shall apply, and the arbitration shall proceed under and pursuant to the laws of the State of New York. In the event of any failure in the methods herein prescribed the procedure shall be under and pursuant to the arbitration law of the State of New York, or of the State of New Jersey, or of the United States, depending on the court which may have jurisdiction.

CLAUSE IN STANDARD CONTRACT FOR ENGINEERING CONSTRUCTION²

(a).—Demand for Arbitration.—Any decision of the Engineer which is subject to arbitration shall be submitted to arbitration upon the demand of either party to the dispute.

The Contractor shall not cause a delay of the work because of the pendency of arbitration proceedings, except with the written permission of the Engineer, and then only until the arbitra-

² *American Society of Civil Engineers. Proceedings.* March, 1926. p. 240-1. The report on "Standard Contract" for engineering construction was issued by the Joint Conference on Standard Construction Contracts in February 1925 and presented to the annual meeting January 20, 1926.

tors shall have an opportunity to determine whether or not the work shall continue until they decide the matters in dispute.

The demand for arbitration shall be delivered in writing to the Engineer and the adverse party, either personally or by registered mail to the last known address of each, within ten days of the receipt of the Engineer's decision, and in no case after final payment has been accepted except as otherwise expressly stipulated in the Contract Documents. If the Engineer fails to make a decision within a reasonable time, a demand for arbitration may be made as if his decision had been rendered against the demanding party.

(b).—Arbitrators.—No one shall be nominated or act as an arbitrator who is in any way financially interested in this Contract or in the business affairs of the Owner, or the Contractor, or the Engineer, or otherwise connected with any of them. Each arbitrator shall be a person in general familiar with the work or the problem involved in the dispute submitted to arbitration.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this Contract, to the other party, and the third chosen by those two arbitrators, or if they should fail to select a third within fifteen days, then he shall be appointed by the presiding officer, if a disinterested party, of the Bar Association nearest to the location of the work.³ Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to name an arbitrator within said ten days, then said³ presiding officer shall appoint such arbitrator within ten days, and upon his failure so to do then such arbitrator shall be appointed on the petition of the party demanding arbitration by a judge of the Federal Court in the district where such arbitration is to be held.

The said³ presiding officer shall have the power to declare the position of any arbitrator vacant by reason of refusal or inability to act, sickness, death, resignation, absence or neglect. Any vacancy shall be filled by the party making the original appointment, and unless so filled within five days after the same has been declared, it shall be filled by the said³ presiding officer.

³ To provide some other agency for appointing arbitrators strike out reference to presiding officer of the Bar Association and insert desired designation. In the vicinity of New York, the American Arbitration Association, and the Chamber of Commerce of the State of New York have Arbitration Committees which often act in this capacity.

If testimony has been taken before a vacancy has been filled, the matter must be reheard unless a rehearing is waived in the submission or by the written consent of the parties.

If there be one arbitrator his decision shall be binding; if three, the decision of any two shall be binding in respect to both the matters submitted to and the procedure followed during the arbitration. Such decision shall be a condition precedent to any right of legal action.

(c).—Arbitration Procedure.—The arbitrators shall deliver a written notice to each of the parties and to the Engineer, either personally or by registered mail to the last known address of each, of the time and place for the beginning of the hearing of the matters submitted to them. Each party may submit to the arbitrators such evidence and argument as he may desire and the arbitrators may consider pertinent. The arbitrators shall, however, be the judges of all matters of law and fact relating to both the subject matters of and the procedure during arbitration and shall not be bound by technical rules of law or procedure. They may hear evidence in whatever form they desire. The parties may be represented before them by such person as each may select, subject to the disciplinary power of the arbitrators if such representative shall interfere with the orderly or speedy conduct of the proceedings.

Each party and the Engineer shall supply the arbitrators with such papers and information as they may demand, or with any witness whose movements are subject to their respective control, and upon refusal or neglect to comply with such demands the arbitrators may render their decision without the evidence which might have been elicited therefrom, and the absence of such evidence shall afford no ground for challenge of the award by the party refusing or neglecting to comply with such demand.

The submission to arbitration (the statement of the matters in dispute between the parties to be passed upon by the arbitrators) shall be in writing duly acknowledged before a notary. Unless waived in writing by both parties to the arbitration, the arbitrators, before hearing testimony, shall be sworn by an officer authorized by law to administer an oath, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding.

The arbitrators, if they deem the case demands it, are authorized to award to the party whose contention is sustained

such sums as they shall consider proper for the time, expense and trouble incident to the arbitration, and if the arbitration was demanded without reasonable cause, damages for delay and other losses. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and acknowledged like a deed to be recorded, and a duplicate shall be delivered personally or by registered mail, forthwith upon its rendition to each of the parties to the controversy and to the Engineer. Judgment may be rendered upon the award by the Federal Court or the highest State Court having jurisdiction to render same.

The award of the arbitrators shall not be open to objection on account of the form of the proceedings or the award, unless otherwise provided by the controlling statutes. In the event of such statutes providing on any matter covered by this Article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accord with said statutes, it being the intention hereby to lay down a principle of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

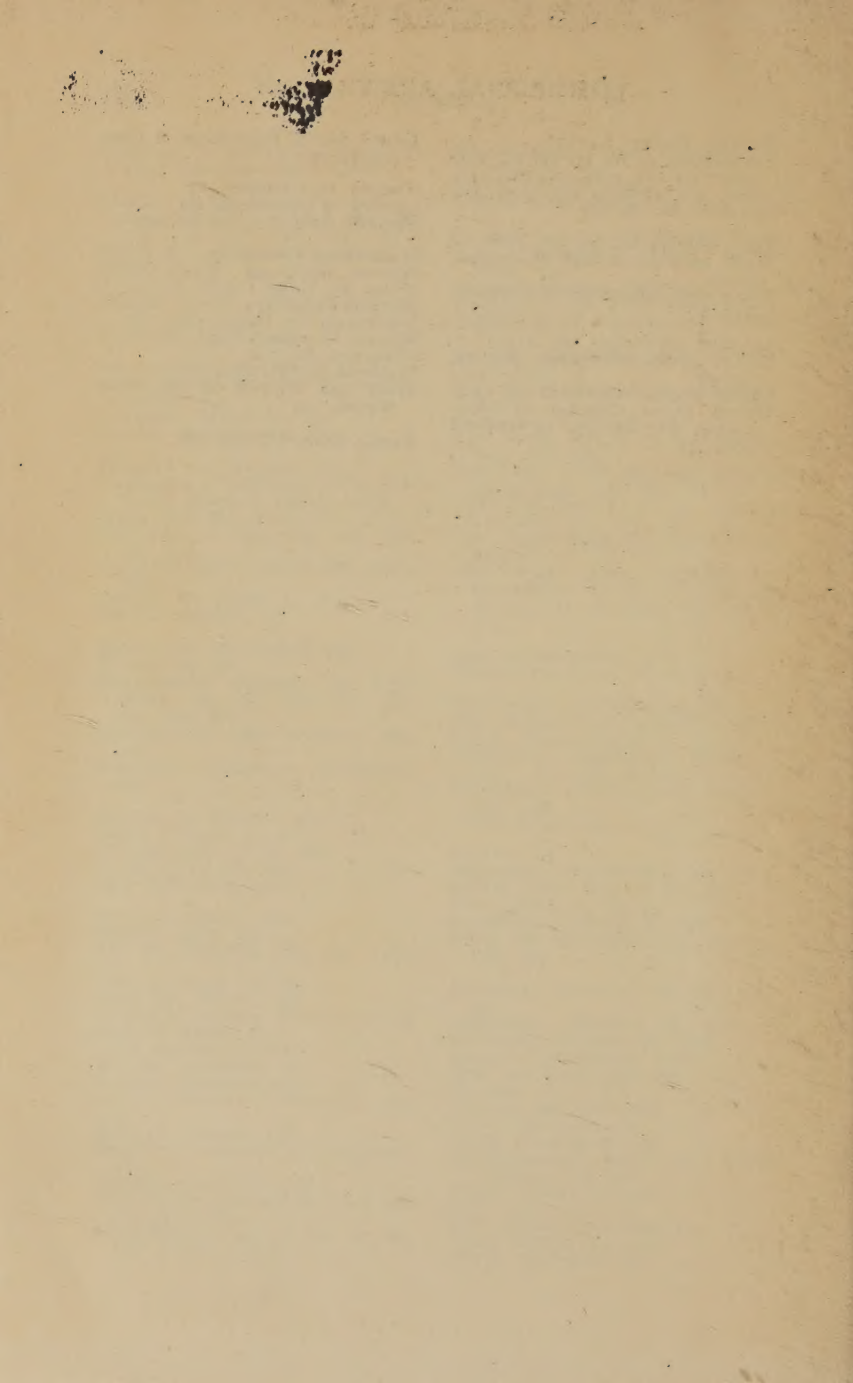
The Engineer shall not be deemed a party to the dispute. He is given the right to appear before the arbitrators to explain the basis of his decision and give such evidence as they may require.

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